TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1922

N[redacted].199

FRANK MOORE, ED. HICKS, J. E. KNOX, ET AL.,
APPELLANTS,

vs.

E. H. DEMPSEY, KEEPER OF THE ARKANSAS STATE PENITENTIARY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

FILED OCTOBER 24, 1921.

(28,550)

(28,550)

SUPREME COURT OF THE UNITED STATES.

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No. 595.

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In the District Court of the United States for the Western Division of the Eastern District of Arkansas.

Be it remembered, That on the 21st day of September, A. D. 1921, came into the office of the Clerk of the District Court of the United States for the Western Division of the Eastern District of Arkansas, Frank Moore, Ed. Hicks, J. E. Knox, Ed. Coleman and Paul Hall, by Murphy, McHaney & Dunaway, and Scipio A. Jones, Esqs., their attorneys, and filed therein their Petition for Writ of Habeas Corpus, against E. H. Dempsey, Keeper of the State Penitentiary of the State of Arkansas, which Petition for Writ of Habeas Corpus is as follows:

In the United States District Court for the Western Division of the Eastern District of Arkansas.

FRANK MOORE, ED HICKS, J. E. KNOX, ED COLEMAN, and PAUL HALL, Petitioners,

vs.

E. H. DEMPSEY, Keeper of the Arkansas Penitentiary, Defendant.

Petition for a Writ of Habeas Corpus.

Your petitioners, Frank Moore, Ed Hicks, J. E. Knox, Ed Coleman and Paul Hall, state that they are citizens and residents of the State of Arkansas, and are now residing in Little Rock, confined in the Arkansas State Penitentiary, in the Western Division of the Eastern District of Arkansas, within the jurisdiction of this court; that the defendant is the keeper of the said Arkansas State Penitentiary, and as such is unlawfully restraining your petitioners of their liberty, and will, unless prevented from doing so by the issuance of the writ herein prayed for, deprive them of their lives on the 23rd day of Sept, 1921, in violation of the Constitution and laws of the United States, and Constitution and laws of the State of Arkansas.

Petitioners further say that they are negroes, of African descent, black in color, and that prior to the times hereinafter mentioned were citizens and residents of Phillips County, Arkansas, at Elaine; that on the — day of October, 1919, they were arrested, placed in the Phillips County jail and thereafter until their trial were kept in close confinement upon an alleged charge of murder in the first degree for the killing of one Clinton Lee, a white man, said to have occurred on the 1st day of October, 1919; that said Clinton Lee was killed, as they are informed, while a member of a posse of white men who were said to be attempting to quell a race riot, growing out of the killing of W. A. Adkins on the night of September 30th, 1919; at Hoop Spur, in said County and State; that said Adkins was killed, as they are advised, under these circumstances and conditions; Peti-

tioners and a large number of the members of their race were peaceably and lawfully assembled in their church house at or near Hoop Spur, with no unlawful purpose in view, and with no desire or purpose to injure or do any wrong to any one; that while they were thus assembled, white persons began firing guns or pistols from the outside into and through said church house, through the windows and shooting the lights out therein, causing a great disturbance and stampede of those assembled therein; that the white persons so firing on said church come there in automobiles, of which there were several, and came for the purpose of breaking up said meeting; that said Adkins was killed either by members of his own party or by some other person unknown to your petitioners; that the white men sent out the word to Helena, the County seat, that said Adkins had been killed by the Negroes, shot down in cold blood while on a peaceable mission, by an armed force of negroes, assembled at said church, which caused great excitement all over the City of Helena and Phillips County; that the report of said killing spread like wild fire into other counties, all over the State of Arkansas, and into other States, notably the State of Mississippi; that early the next day a large number of white men of said county armed themselves and rushed to the scene of the trouble and to adjacent regions, the vicinity of Elaine being one of them, and began the indiscriminate hunting down, shooting and killing of negroes; that in a short time white men from adjoining counties and from the State of Mississippi likewise armed themselves, rushed to the scene of the trouble and began the indiscriminate shooting down of Negroes, both men and women, particularly the posse from the State of Mississippi, who shot down in cold blood innocent Negro men and women, many of whom were at the time in the fields picking cotton; that highly inflam-atory articles were published in the press of Arkansas and especially of Helena and throughout the United States, in which the trouble was variously called a "race riot," "and uprising of the Negroes" and "A deliberately planned insurrection among the Negroes against the whites" of that part of Phillips County; that the officers of Phillips County, especially the Sheriff, called upon the Governor of the State, and the Governor in turn called upon the Commanding Officer at Camp Pike for a large number of United States soldiers to assist the citizens in quelling the so called "race riot," "uprising" or "insurrection"; that a company of soldiers was dispatched to the scene of the trouble who took charge of the situation and finally succeeded in stopping the slaughter.

Your petitioners further say that they, together with a large number of their race, both men and women, were taken to the Phillips County jail, at Helena, incarcerated therein, and charged with murder; that a committee of seven composed of leading Helena business men and officials, to-wit: Sebastian Straub, Chairman, H. D. Moore, County Judge, F. F. Kitchens, Sheriff, J. G. Knight, Mayor, E. M. Allen, J. E. Horner and T. W. Keesee, was selected for the purpose of probing into the situation and picking out those to be condemned to death and those to be condemned and sentenced to the penitentiary; that said Committee assumed charge of the matter and pro-

ceeded to have brought before them a large number of those incarcerated in jail and examined them regarding their own connection and the coonnection of others charged with participation in said trouble; that if evidence unsatisfactory to said Committee was not given they would be sent out and certain of their keepers would take them to a room in the jail wrich was immediately adjoining, and a part of the Courthouse building where said Committee was sitting, and torture them by beating and whipping them with leather straps with metal in them, cutting the blood at every lick until the victim would agree to testify to anything their torturers demanded of them; that there was also provided in said jail, to further frighten and torture them, an electric chair, in which they would be put naked and the current turned on to shock and frighten them into giving damaging statements against themselves and others; also strangling drugs were put up their noses for the same purpose and by these methods and means false evidence was extorted from Negroes to be used and was used against your petitioners.

Petitioners further say that on every day from October 1st, until after their trial on November 3rd, 1919, the press of Helena and the State of Arkansas carried inflam-atory articles giving accounts of the trouble, which were calculated to arouse and did arouse bitter feeling against your petitioners and the other members of their race; that on October 7th, 1919, the Helena World, a newspaper published and printed in the City of Helena, and having a wide and almost universal circulation throughout said County, published an article written and given out by Mr. E. M. Allen, a member of said Committee of Seven, for and on behalf of said Committee, purporting to give the facts concerning what he called "not a race riot," but a "deliberately planned insurrection of the Negroes against the Whites," in which it was stated that the Union, of which petitioners were members, was "established for the purpose of banding Negroes together for the killing of white people"; that a copy of said *said* article is attached hereto, made a part hereof and marked Exhibit "A"; that shortly after being placed in Jail, a mob was formed in the city of Helena, composed of hundreds of men, who marched to the County jail for the purpose and with the intent of lynching your petitioners and others, and would have done so but for the interference of United States soldiers and the promise of some of said Committee and other leading officials that if the mob would stay its hand they would execute those found guilty in the form of law.

Petitioners further state that prior to October 1, 1919, they were farmers, share croppers; that nearly all the land in Phillips County is owned by white men; that same is rented out to share croppers to be tilled on shares, one half to the tenant and the other half to the owner; that for some years past there has grown up a system among the land owners of furnishing the Negro tenants supplies on which to make crops and which is calculated to deprive and does deprive the Negro tenants of all their interest in the crops produced by them; that in pursuance of this system, they refused to give their share croppers any itemized statement of account of their indebtedness for supplies so furnished, refused to let them move or sell any part of their crops,

but themselves sell and dispose of the same at such prices as they please, and then give to the Negroes no account thereof, pay them only such amount as they wish and in this way kept them down, poverty stricken and effectually under their control; that for the purpose of protecting themselves, if possible against the oppressive and ruinous effects of this system, the Negro farmers organized societies, with the view of uniting their financial resources in moral and legal measures to overcome the same, which fact became quickly known to the plantation owners; that such owners were bitterly opposed to such societies, sought to prevent their organization, ordered the members to discontinue their meetings and sought by every means they could employ to disrupt them; that on the 30th day of September, 1919, petitioners and other members of the Ratio Lodge, near Elaine, learned that some of the Negro farmers of a nearby plantation had employed U. S. Bratton, an attorney of Little Rock, Arkansas, to represent them in effecting a settlement for them with their landlords, or if he could not so institute legal proceedings to protect their interests, and that either he, or his representatives, would be there on the following day to meet with all the parties concerned, perfect the arrangements, and learn all the facts as far as possible, and decided to hold a meeting with the view of seeing him while there, and engaging him as an attorney to protect their interest; that accordingly they met that night at Hoop Spur Church house, which resulted, as hereinbefore set out, in the killing of said Adkins and the breaking up of said meeting; that on the morning of October 1st, Mr. O. S. Bratton, son and agent of Attorney U. S. Bratton, arrived in Elaine for consultation with those who might desire to employ his father, was arrested, barely escaped being mobbed, notwithstanding it was well known he was there only for the purpose of advising with those Negroes as to their rights, and getting from them such facts as would enable his father intelligently to prepare for their legal rights; that he was carried thence to the County jail, thrown into it and kept closely confined on a charge of murder until the 31st day of the same month, when he was indicted on a charge of barratry, without any evidence to sustain the charge; that on that day, he was told by officials that he would be discharged, but not to go on the public streets anywhere, to keep the matter a secret, to leave secretly in a closed automobile and to go to West Helena, four miles away, and there take the train, so as to avoid being mobbed; that he was told that he would be mobbed, or would be in great danger of being mobbed if his release became known publicly before he was out of reach; that the Judge of the Circuit Court, the Judge of the same court before whom petitioners were tried, facilitated the secret departure and himself went to West Helena and there remained until he had seen said Bratton safely on the train and the train departed.

Petitioners further say that the Circuit Court of Phillips County convened on October 27th, 1919; that a grand jury was organized composed wholly of white men, one of whom T. W. Keesee, was a member of the said Committee of Seven, and many of whom were in the posses organized to fight the Negroes; that during its session, petitioners and many others of the prisoners were frequently carried

before it in an effort to extract from them false incriminating admissions and to testify against each other, and that both before and after, they were frequently whipped, beaten and tortured; that those in charge of them had some way of learning when the evidence was unsatisfactory to the grand jury, and this was always followed by beating and whipping; that by these methods, some of the Negro prisoners were forced to testify against others, two against your petitioners, though no one could truthfully testify against them; that on October 29th, 1919, a joint indictment was returned against petitioners accusing them of the murder of said Clinton Lee, a man petitioners did not know, and had never, to their knowledge even seen; that thereafter on the 3rd day of November 1919, petitioners were taken into the court room before the judge, told of the charge, and were informed that a certain lawyer was appointed to defend them; that they were given no opportunity to employ an attorney of their own choice; that the appointed attorney did not consult with them, took no steps to prepare for their defense, asked nothing about their witnesses, though there were many who knew that petitioners had nothing to do with the killing of said Lee; that they were immediately placed on joint trial before an exclusively white jury and the trial closed so far as the evidence was concerned with the State's witnesses alone; that after the court's instructions, the jury retired just long enough to write a verdict of guilty of murder in the first degree, as charged, and returned with it into court—not being out exceeding two or three minutes, and they were promptly sentenced to death by electrocution for December 27th, 1919.

Petitioners further say that during the course of said trial, which lasted less than an hour, that only two witnesses testified to anything to connect them in any way with the killing of said Clinton Lee; that said witnesses were Walter Ward; and John Jefferson, both of whom were Negroes and were under indictment at the same time for the killing of said Lee; that they were compelled to testify against them by the same methods and means hereinbefore described; that their testimony was wholly false and that they gave such testimony through fear of torture and were further told that if they refused to testify that they would be killed, but that if they did so testify, and would plead guilty their punishment would be light; that they thereafter plead guilty to murder in the second degree and were sentenced to terms of imprisonment; that they attach hereto the affidavits of each of said witnesses showing the falsity of their testimony and the means of its acquisition, make them a part hereof and mark them Exhibit "B" and "C" respectively; that they also attach hereto a certified transcript of the proceedings in the Phillips Circuit Court as Exhibit "D."

Petitioners further say that large crowds of white people bent on petitioners' condemnation and death thronged the courthouse and grounds and streets of Helena all during the trial of petitioners and the other negro defendants; that on account of the great publicity given theirs and the other cases, on account of their being charged with connection with an insurrection against the white people, and that four or five white men were killed, on account of the fact that

they are Negroes, and those who run the court, the Judge upon the bench, the Sheriff, the Clerk and all the jurors being white men, on account of the fact that it was stated and widely published that the purpose of the negroes was to kill the whites and take their property, and on account of all the race prejudice which normally exists and which was enhanced a thousand fold at the time, by bitterness beyond expression, was impossible for them to get a fair and impartial trial in said court before a jury of white men; that the attorney appointed to defend them knew that the prejudice against them was such that they could not get a fair and impartial trial before a white jury of said county, yet he filed no petition for a change of venue, did not ask the court for time to prepare a defense, and did nothing to protect their interests; that the court did not ask them whether they had counsel, or desired to employ counsel, or were able to do so, but simply said a lawyer, whom he named, would defend them; that they have, therefore, not had a trial, have had no opportunity to make a defense, but that their case was closed against them as virtually and effectually as if on a plea of guilty; that if they had been given the opportunity they would have employed counsel of their own choice and have made a defense, their ability to do so having been demonstrated since their conviction; that the feeling against petitioners was such that it over-awed the Judge on the bench, the jury, the attorney appointed to defend them and every one connected with said court; that all, Judge, jury and counsel were dominated by the mob spirit that was universally present in court and out, so that if any juror had had the courage to investigate said charge with any spirit of fairness, and vote for an acqu-ttal, he, himself, would have been the victim of the mob; that such was the intensity of feeling against petitioners and the other defendants that had counsel for them objected to the testimony of the two witnesses against them, said Ward and Jefferson, on the ground that it was extorted by beating and torture, as they are advised he should have done, he himself would have been the victim of the mob; that it is possible counsel did not know how the evidence against them was obtained, and they do not desire to appear to criticize him, yet he knew that if the evidence against them was acquired as before stated, it was incompetent and should have been excluded, a fact which petitioners did not know; that petitioners were ignorant of their rights, had never been in court before, and had counsel asked them about this testimony they would have told him how it was obtained; that through fear of the mob spirit no witness was called in their behalf and they themselves were advised not to take the stand on their own behalf; that as a result of the mob domination of court, counsel and jury, the court, although a court of original jurisdiction in felony cases, lost its jurisdiction by virtue of such mob domination and the result was but an empty ceremony, carried through in the apparent form of law, and that the verdict of the jury was really a mob verdict, dictated by the spirit of the mob and pronounced and returned because no other verdict would have been tolerated, and that the judgment against them is, therefore, a nullity.

Petitioners further say that the entire trial, verdict and judg-

ment against them was but an empty ceremony; that their real trial and condemnation had already taken place before said Committee of Seven; that said Committee, in advance of the sitting of the court, had sat in judgment upon them and all the other cases and had assumed and exercised the jurisdiction of the court by determining the guilt or innocence of those in jail, had acquired the evidence in the manner herein set out, and decided which of the defendants should be electrocuted and which sent to prison and the terms to be given them, and which to discharge; that when court convened, the program laid out by said Committee was carried through and the verdict against petitioners *were* pronounced and returned, not as the independent verdict of an unbiased jury, but as a part of the prearranged scheme and judgment of said Committee; that in doing this the court did not exercise the jurisdiction given it by law and wholly lost its jurisdiction by substituting for its judgment the judgment of condemnation of said Committee; that there is attached hereto as Exhibit "E" a letter from said Committee to the then Governor of the State showing the truth of said charges.

Petitioners further say that, ever since the law of Arkansas for the selection of jury commissioners, the grand and petit jurors, as it now stands, was enacted, all of the judges of the courts have been and are now white men, and that ever since then said judges have appointed, without exception, white commissioners to select the jurors, both grand and petit, and that such commissioners have uniformly selected only white men on such juries; that all of this has been done in discrimination against the negro race, on account of their color; that such has been the unbroken practice in Phillips County for more than thirty years, notwithstanding the negro population in said county exceeds the white population by more than five to one and that a large proportion of them are electors and possess the legal, moral and intellectual qualifications required or necessary for such jurors; that the exclusion of said negroes from the juries was, at all times, intentional and because of their color, of their being negroes; that such was the case of the grand jury by which petitioners were indicted, and of the petit jury that pronounced them guilty; that under the law of Arkansas, as construed by the Supreme Court of the State, an objection to an indictment on the ground that it was found by a grand jury composed only of white men to the exclusion of negroes on account of their color, must be made at the impannelling of the grand jury and objection to the petit jury must be made before a plea is entered to the indictment; that at the time said indictment was found petitioners were confined in jail and did not know the grand jury had been organized, did not know it was in session, did not know they were to be indicted for the killing of said Lee or any other person and did not know they were charged therewith; that it was impossible for them to make any objection to the organization of said grand jury for the very simple reason that they were closely confined, had no attorney, and no opportunity to employ an attorney; that at their trial counsel appointed to defend them made no objection to the petit jury or to any previous proceeding; that their failure to do so

was through fear of the mob for petitioners and himself, as they believe.

Petitioners further say that after their conviction and sentence to death, their friends employed other counsel to represent them; that through such counsel they filed a motion for a new trial, copied in the record attached hereto as Exhibit "D," which was promptly overruled and an appeal was taken to the Supreme Court of Arkansas, the highest court in said State, where, on the 29th day of March, 1920, the judgment of the Phillips Circuit Court was affirmed, a copy of the opinion of said court being attached hereto as Exhibit "F" (Ed. Hicks vs. State, 143 Ark. 158); that thereafter they applied to the Supreme Court of the United States for a Writ of Certiorari to the Supreme Court of Arkansas, praying that said court be required to send up the record and proceeding in said cause for review by the Supreme Court of the United States, but that on the 11th day of October, 1920, the application for said writ was denied; that the Governor of the State of Arkansas did on the — day of Aug. 1921, issue a proclamation carrying into effect the judgment and sentence of the Phillips Circuit Court against petitioners and in which he fixed Sept. 23, 1921, as the date of their execution, a copy of which proclamation is hereto attached as Exhibit "G."

Petitioners further say that on the 19th day of October, 1920, the Richard L. Kitchens Post of the American Legion of Helena, Arkansas, an organization composed of approximately three hundred white ex-service men living in every part of Phillips County, passed a resolution calling on the Governor of the State of Arkansas, for the execution by death of petitioners and the seven other Negroes condemned to death by said Circuit Court at the same time and under the same circumstances as petitioners, and protesting against the commutation of the death sentence of any of said Negroes, which said Resolution was presented to the Governor of Arkansas, and a copy of same is attached hereto as Exhibit "H;" that at a meeting of the Rotary Club of Helena, Arkansas, attended by seventy-five members, representing as many leading industrial and commercial enterprises of said city, and of the Lions Club of said city, attended by sixty-five members, representing as many of the same kind of enterprises of said city, each adopted a resolution approving the action of the Richard L. Kitchens Post of the American Legion in the premises, which said resolutions were presented to the then Governor of the State of Arkansas and copies of each are hereto attached as Exhibits "I" and "J" respectively; that said resolutions further and conclusively show the existence of the mob spirit prevalent among all the white people of Phillips County at the time petitioners and the other defendants were put through the form of trials and show that the only reason the mob stayed its hand, the only reason they were not lynched was that the leading citizens of the community made a solemn promise to the mob that they should be executed in the form of law.

Petitioners further say that to further show the overwhelming existence of the mob spirit and mob domination of their and other

trials of negro defendants at the October term, 1919, of the Phillips Circuit Court, there were six defendants convicted of murder in the first degree, to wit: John Martin, Alf Banks, Will Wordlow, Albert Giles, Joe Fox, and Ed Ware, whose cases were also appealed to the Supreme Court of Arkansas, which were reversed on account of bad verdicts, due to the extreme haste in securing convictions and executions (Banks vs. State (143 Ark. 154), and remanded for a new trial; that upon a re-trial of said cases, defendants were again convicted and appealed to the Supreme Court, and their cases were again reversed (Ware vs. State, Vol. 4 Sup. Court Rep. No. 11, page 674), and remanded for a new trial on December 6th, 1920; that said cases were coming on for trial at the May term of the Phillips Circuit Court, which convened on May 2nd, 1921, and it was represented to the Governor of the State of Arkansas by the white citizens and officials of Phillips County that, unless a date of execution was set for petitioners there was grave danger of mob violence to the other six defendants whose cases would be called for trial at the May term of said Court and that in all probability they would be lynched; that in order to appease the mob spirit still prevalent in Phillips County and in a measure to secure the safety of the six negroes whose cases were to be called for trial and were called on May 9th, 1921, the Governor issued a proclamation fixing a date of execution of Petitioners for June 10th, 1921, which was stayed by Court proceedings; that these facts conclusively show that the mob spirit, mob domination, is still universally present in Phillips County.

Petitioners further say that on the 8th day of June, 1921, they filed a petition in the Pulaski Chancery Court for a Writ of Habeas Corpus setting out the matters and things as herein stated, and that on said date the Pulaski Chancery Court issued its writ of Habeas Corpus, directed to the defendant, E. H. Dempsey, keeper of the Arkansas State Penitentiary, commanding him to have the bodies of the petitioners in Court at 2 o'clock P. M. on the 10th day of June, 1921, and then and there state in writing the terms and cause of their imprisonment; that on the 9th day of June, 1921, the Attorney General for the State of Arkansas filed with the Supreme Court of Argkansas a Petition for Writ of Prohibition against J. E. Martineau, Chancellor of the Pulaski Chancery Court, and your petitioners, and that on the 20th day of June, 1921, the Supreme Court of the State of Arkansas issued its Writ of Prohibition against the Judge of the Pulaski Chancery Court, prohibiting him from hearing the Petitions for Habeas Corpus pending in his court and quashed the Writ of Habeas Corpus theretofore issued; that a copy of the Opinion of the Supreme Court in issuing said Writ of Prohibition is attached hereto, made a part hereof and marked "Exhibit K," that thereafter, to-wit: on the 4th day of August, 1921, your petitioners made application to the Hon. Oliver Wendell Holmes, Associate Justice of the Supreme Court of the United States, for a Writ of Error, to the Supreme Court of the State of Arkansas in the matter of said Writ of Prohibition, but same was denied.

Petitioners, therefore, say that by the proceedings aforesaid, they were deprived of their rights and are about to be deprived of their lives in violation of Section 1, of the 14th Amendment of the Constitution of the United States and the laws of the United States enacted in pursuance thereto, in that they have been denied the equal protection of the law, and have been convicted, condemned, and are about to be deprived of their lives without due process of law; that they are now in the custody of the defendant, E. H. Dempsey, Keeper of the Arkansas State Penitentiary, to be electrocuted on the 23rd day of September, 1921; that they are now detained and held in custody by said Keeper and will be electrocuted on said date unless prevented from so doing by the issuance of a writ of Habeas Corpus.

Petitioners therefore pray that a Writ of Habeas Corpus be issued to the end that they may be discharged from said unlawful imprisonment and unlawful judgment and sentence to death.

(Signed) FRANK MOORE,
his
" ED x HICKS,
mark
" J. E. KNOX,
his
" ED x COLEMAN,
mark
his
" PAUL x HALL.
mark

Petitioners.

Witness to mark:

(Signed) J. R. BOOKER.

(Signed) S. A. JONES,
MURPHY, McHANEY & DUNAWAY,
Attorneys for Petitioners.

Frank Moore, Ed Hicks, J. E. Knox, Ed Coleman and Paul Hall on their oaths say that the matters and things set out and contained in the foregoing petition for Writ of Habeas Corpus are true to the best of their knowledge and belief.

Subscribed and sworn to before me, this 21st day of September 1921.

[SEAL.] (Signed) J. R. BOOKER,
Notary Public.

My Commission expires Jan. 31, 1923.

Endorsed: Filed Sept. 21, 1921. Sid. B. Redding, Clerk.

Exhibit "A."

Inward Facts About Negro Insurrection.

President E. M. Allen, of Business Men's League, Issues Statement to Press.

Hill's Influence.

Winchester Negro Adroitly Misled Trustful Negroes and Robbed Them of Cash, Liberty Bonds, and Savings Stamps—His Activities.

The Committee of Seven.

The Committee of Seven, chosen to direct operations in putting down the insurrection and to conduct investigations with the view to discovering and punishing the guilty, is composed of the following citizens:

Sebastian Straub, Chairman.
H. D. Moore, County Judge.
F. F. Kitchens, Sheriff.
J. G. Knight, Mayor.
E. M. Allen.
E. C. Horner.
T. W. Keese.

All persons, white or black, in possession of information which might assist in discovering and running down those responsible for the insurrection are urgently requested to confer with the Committee as a whole or with some individual member thereof, it being understood that such action will be for the public safety and that the informant's identity will be carefully safeguarded.

It is the Duty of Every Citizen in Possession of Such Information to Present it to the Committee.

The following statement was given to the press here late yesterday afternoon by the President E. M. Allen of the Business Men's League and the Committee of Seven, but for some reason not explained editors of various papers to which the statement was sent saw fit to substitute a different "lead," in most cases failing completely to identify Mr. Allen.

Now the "ignorance and superstition of a race of children" was played upon for momentary gain and for the banding together of Negroes to slay whites, was authoritatively revealed in a statement issued here yesterday by E. M. Allen, a member of the Committee of Seven, who has heard virtually all the prisoners' confessions follwing last week's uprising in this section of Arkansas.

The Committee of Seven is composed of leading Helena Business men. It has been authorized to carry on the investigation both by

the municipal and county authorities and by Governor Charles H. Brough of Arkansas. It is co-operating with the military authorities. Among its members is Sheriff F. F. Kitchens.

Mr. Allen is considered by leading officials and citizens of Helena as being most competent to speak on the subject because of his prominent part in the investigations which have taken place. He has been a resident of Helena for thirteen years and was one of the men who originally plotted and created Elaine, center of the recent disorders.

Aside from being locally prominent as president of the Helena Business Men's League, and as the owner of considerable property, Mr. Allen is President of the National Association of Insurance Agents, the headquarters of which are in New York City. His name was on the list of those the negroes plotted to kill yesterday as the signal for a general slaughter of the whites, according to papers confiscated and confessions of leaders captured.

Mr. Allen's statement follows:

"The present trouble with the negroes in Phillips County is not a race riot. It is a deliberately planned insurrection of the negroes against the whites, directed by an organization known as the "Progressive Farmers' and Household Union of America," established for the purpose of banding negroes together for the killing of white people. This "union" was started by Robert L. Hill, a negro 26 years old, of Winchester, Arkansas, who saw in it an opportunity of making easy money. He had been a farmer all his life, but lately had been posing as a "private detective doing work in this and all foreign countries."

"He started his first 'union' work in April of this year. He organized the Ratio Lodge in May of this year. He chose Ratio because his mother happened to be living there. He told the darkies that he was an agent of the government and because the senators and representatives at Washington were white men and in sympathy with the white men of the south, it was impossible for the negroes to get the rights that had been promised them for service in the army, and so the government had called into existence this organization which would be supported by the government in defense of the negroes against the white people. He told them it was necessary for all members of the Union to arm themselves in preparation for the day when they should be called upon to attack their white oppressors.

"The slogan of the organization is "We battle for our rights." The password of all the lodges was "We have just begun."

"He told them that those members who where unable to buy munitions would be supplied by the union from the government storehouse at Winchester.

"The purely mercenary side of all develops as follows: Negro men were charged $1.50 entrance fees and Negro women 50 cents. At the second and third meeting he would bring Dr. V. E. Powell of Winchester with him, who purported to be the examining physician

for the government in its work of registering the negroes in defense of their rights. A certificate was filled out and signe- — Negro upon payment of fifty cents. This certificate was supposed to be the registration document. Those negroes who were possessed of funds in amounts from $5.00 to $25.00 were enrolled in an advanced section of the union and upon payment of whatever sum he (Hill) could procure in excess of $5.00, a certificate was given, entitling the holder to attend the congresses of the 'union' at Winchester and speak on the floor of the meeting regarding any questions brought up, and to assist in keeping the Constitution of the United States from being questioned.

"Another form of extortion was to sell shares of $10.00 each to the negroes in a proposed building to be erected by the 'union' at Winchester. Hill would find out what negroes possessed thrift stamps and Liberty Bonds and would issue a certificate stating that so many shares had been purchased at $10.00 per share, and all negroes buying shares in the amount of fifty dollars or more were told that their names would be engraved in the building. In other words, he had so planned his campaign that any negro possessiong from fifty cents to fifty dollars was given an opportunity to invest in something connected with the 'union.'

"He then advised the members that the general attorney of the 'union' in Little Rock would for an additional consideration represent all the negroes in their settlements with the landlords during the ginning season. He went to several of the meetings with typewritten powers of attorney which he had signed by the negroes, collecting amounts from twenty-five dollars to fifty dollars each with the crop as security. He was very adroit in making use of certain circulars issued by the government and in distorting the purpose of the Arkansas Warehouse and Ginners' Law to convince the Negroes that the United States government was endeavoring to correct evils which he alleged existed among the farmers.

"He further told the negroes that the plan for Secretary Lane to provide homesteads for the soldiers had been carried out where the white soldiers were concerned, but the negroes had been refused participation in it. We found where Negro soldiers at Elaine had sold their discharge papers for sums ranging from fifty to one hundred dollars on the theory that such discharges entitled the holder to forty acres of government land. He produced maps of state lands in Elaine country (1,600) acres which he said could be bought for $200. This amount was raised at one meeting and paid to him in cash. The land was all described and certain negroes had designated which parts of the various farms (all in cultivation), they desired, to take over for themselves after the white people had been driven off.

"He urged all lodges to decide upon a plan of campaign when the day came to strike and designate the part to be played by every man. He told them that the government was erecting at Winchester three huge storehouses where arms, ammunition and trained soldiers would be ready for instant use. On Wednesday morning after the first fight at Hoop Sur the negroes crossed the track and

lay in the weeds all day waiting for Hill's army to materialize. They were within easy range of automobiles going to and from Hoop Spur all day and could easily have fired into them but they wished to wait for Hill's army in order to clean up in one fell swoop.

"The fight at Hoop Spur was unpremeditated as far as the negroes were concerned as they were organizing their forces Wednesday morning to attack and capture Elaine but when runners informed the leaders that white men were entering the woods at Hoop Spur they decided to go up and wipe out the little gang that was reported to be there, before entering upon the more serious task of capturing Elaine. They underestimated the size of the force from Helena and the battle resulted.

"Every negro who joined these lodges was given to kill white people. Unquestionably the time for attack had been set but plans had not been entirely perfected and the shooting of the officers brought on the insurrection ahead of schedule.

"Another scheme used by Hill to obtain money was to appoint *was to appoint* leading negroes, or several of them, in each lodge as private and foreign detectives'—furnishing them large nickelplated stars and a pair of nickel-plated handcuffs, for which they paid him $50.00 each.

"His meeting at Winchester in August was attended and addressed by white men. He simply played upon the ignorance and superstition of a race of children—most of whom neither read nor write.

"I have cross-examined and talked to at least one hundred prisoners at Elaine. They belong to different lodges in that section. The stories they tell are almost identical as to the promises and representations made by Hill. He even told them that probably some of the negroes would be called upon to die before 'Equal rights' would be assured, but they must look upon themselves as crusaders and die if necessary to secure the freedom of the other members of their race.

"A remarkable thing about the developments is that some of the ringleaders were found to be the oldest and most reliable of the negroes whom we have known for the past fifteen years. He had made them believe that he had been intrusted with a sacred mission which had to be carried out regardless of the consequences.

"All lodge meetings were required to maintain an armed outer guard of six sentinels. Hill's usual expression was, 'Get your racks filled for the day to come.'

"As far as oppression is concerned, many of the negroes involved own mules, horses, cattle and automobiles and clear money every year on their crops, after expenses are paid."

Endorsed: Filed Sept. 21, 1921. Sid. B. Redding, Clerk.

EXHIBIT "B."

Affidavit of Walter Ward.

STATE OF ARKANSAS,
County of Lincoln:

Walter Ward being first duly sworn, deposes and says:

My name is Walter Ward. I am 36 years of age, am married and have a wife living at Elaine, Arkansas. Prior to this trouble at Elaine I lived on Dr. Cruse's place. I am now confined in the State Penitentiary on the State Farm, at Cummins, Arkansas, on a plea of guilty for murder in the second degree for the killing of Clinton Lee, for which I was not guilty. I was arrested on Friday after the trouble started, kept at Elaine until Monday when I was taken to jail at Helena. A short time after I had been in jail they told me that I had to testify against Frank Moore, Frank Hicks and these other men. I told them I didn't know anything against these men. They told me that I did and that I had to tell it. I refused to tell a lie on these men and they sent me back to jail, later they took me out in another — where they stripped me and whipped me with a rubber strap that had lead or copper placed in it that cut me. Every lick he would hit me would cut the blood out. I do not know how many licks I was hit, but I do know that they nearly killed me. I was also put in an electric chair, stripped naked and the current turned on to shock and frighten me. They also put up my nose some kind of strangling drugs to further torture and frighten me. So the third time they took me out I agreed to testify to anything they wanted me to say. They had it all written out what they said others had testified to and told me that I knew it and that I had to tell it. So in order to save further punishment I agreed to testify and did testify as I was reported in the record in the case against Frank Moore and others. What I said in that case was absolutely untrue. I testified that they had guns at their meeting when I joined it, which was untrue. If anybody had guns I didn't see them. I testified that Paul Hall came to my house and woke me up and that I was to go over to Frank Moore's house, that I went by and got Ed Hicks, that I got a gun after I got over there from Frank Moore, a 32 Smith & Wesson; that Frank Moore lined us up two deep and marched us away; that all of the negroes had guns; that we went on across the field and up to where there was some white folks at the house and some of us went across the railroad and that Frank Hicks made two shots in the dirt road, shot up toward Dr. Richardson's house, the McCoy house, north, all of which was absolutely false.

I now state the truth to be that I was not at Frank Moore's house and that we didn't gang up there, a great crowd of us, and that we didn't march away and that we didn't all have guns, and that Frank Hicks didn't fire any shots up the road to my knowledge and that I know nothing about any of the matters as to which I

testified. I testified as I did only because I was beaten and tortured and compelled to do so. Nobody knows except the men who tortured me, and myself and the others there in jail with me how badly I was treated. A great many other- suffered a like fate. They would take the men out and whip them, we could hear the licks and when the men would come back they would be bleeding all over. I was also indicted for the killing of Clinton Lee, and was told that if I did not plead guilty I would be sent to the electric chair and in order to save myself further torture and to save my life I plead guilty to murder in the second degree, and was sentenced to 21 years in the penitentiary. I was not guilty. I did not fire a single shot in all the trouble that occurred down there. All I knew was that the negroes were trying to keep out of the way of the white people, as we had been told the white folks were going to kill all the negroes. I still have the scars on me now where they beat me to prove that I am telling the truth about being whipped.

(Signed) WALTER WARD.

Subscribed and sworn to before me this 18 day of May, 1921.

[SEAL.] (Signed) J. H. ALBRIGHT,
Notary Public.

My com. exp. April 25, 1925.

EXHIBIT "B" (2nd Page).

Affidavit of George Green.

STATE OF ARKANSAS,
County of Lincoln:

George Green being first duly sworn, deposes and says:

My name is George Green. I am now 22 years of age, and am confined in the State Penitentiary on a convict farm at Cummins, Arkansas. I am the same George Green who testified for the State in the case of the State of Arkansas vs. Frank Hicks, who was tried on November 3, 1919, in the Phillips Circuit Court, on a charge of murder in the first degree for having killed Clinton Lee. On that trial I testified that Frank Hicks was at the lodge meeting on Thursday night before this trouble came up on the following Tuesday and had his gun there. I also testified that everybody I saw had guns there. I further more testified that on Wednesday I took my shot gun and went over to Frank Moore's house a little before day light and that there were about thirty people there sitting around, all of them had guns, and that about 10 or 11 o'clock there were about seventy-five there and we all left including the defendant, Frank Hicks, and marched away with Frank Moore in command to go over towards the place where we heard shooting; and that when we crossed the railroad and had gotten in the public road Frank Hicks fired two shots, and that when he went to shoot the second time I threw up my hands, and says, "Boys don't shoot;" that he shot straight up the road towards McCoy's house, which was north;

that he shot in the direction of some automobiles, and that after that I went home.

I now state and swear positive, that the testimony was false from beginning to end, and that I testified as I did because I was compelled to do so. I furthermore state that I was not at Hoop Spur on the night the trouble started, and that the first I knew about it was the next day when I heard that the white folks were down in that country to kill out all us negroes, and that I did nothing except to keep out of the way. I was arrested on Saturday after the trouble started on Tuesday, was taken to Helena, placed in jail and kept in close confinement until court met. Shortly after I was taken to Helena I was taken out of jail and into a room where three men examined me. I do not know who these men were, but they told me I had to testify against Frank Hicks. They would ask me questions, and I told them I didn't know anything about the matter and they would curse me, abuse me, telling me I did know, that I had to tell it, and that if I didn't tell they would kill me. I was not whipped, but a great many of the negroes there in jail with me were whipped. They would take a man out of the jail and into an adjoining room and we could hear the licks as they whipped him, and when they would bring the man back blood would be running from him. A great many men were taken out and whipped and would be brought back in such a condition that they were unable to walk. They would be dragged back to the cell door and dumped into the cell and left for the other prisoners to take care of them. Knowing how these negroes had been treated and knowing that if I did not do what they told me to do that I would be punished as they were, and in order to avoid such punishment I finally agreed to testify to anything that they wanted me to say. So they told me what I had to say just as I testified to it in the trial, and when I was called as a witness I did what they told me to do. At the same time I was indicted for the murder of Clinton Lee, and they told me that if I would testify against Frank Hicks and then plead guilty, that they would get the court to make it light on me. I later plead guilty to murder in the second degree and was sentenced to six years in the penitentiary. What I testified to against Frank Hicks was untrue. He did not fire the shots that killed Clinton Lee or anybody else at any time that I was with him. I was not guilty of having anything to do with the killing of Clinton Lee or anybody else, and I only testified as I did because I was compelled to.

(Signed) GEORGE GREEN.

Subscribed and sworn to before me this 18 day of May, 1921.

[SEAL.] (Signed) J. H. ALBRIGHT,
Notary Public.

My Commission Expires April 25, 1925.

Endorsed: Filed Sept. 21, 1921. Sid. B. Redding, Clerk.

EXHIBIT "C."

Affidavit of John Jefferson.

STATE OF ARKANSAS,
County of Lincoln:

John Jefferson being first duly sworn, deposes and says:

My name is John Jefferson. I am 30 years of age, and am now confined in the State Penitentiary, on the State Farm at Cummins, Arkansas, on a sentence to a plea of guilty for murder in the second degree for the killing of Clinton Lee. I first refused to plead guilty, because I was not guilty. I had nothing to do with the killing of Clinton Lee, and know nothing about who killed him. I was taken back to jail and told that if I didn't plead guilty that I would be sent to the electric chair, so they took me back to court again and I plead guilty and they gave me five years. I plead guilty to save my own life. I had lived at Elaine three years prior to this trouble there. I joined the union on Friday night before the trouble on Tuesday night. This was the only meeting I ever attended. I saw no guns at that meeting and I had no gun myself. I was arrested on Friday following out in the field picking cotton. They took me to Elaine and kept me there until Monday when they took me to Helena and put me in jail with a large number of other negroes. While I was in jail they took a great many negroes out of the jail and whipped them. I could hear the licks and when they came back bleeding and unable to walk and all whipped to pieces, some of them were so badly beaten up that they had to crawl for several days, being unable to walk, and they would also punish them by putting strangling drugs to their noses to punish them. I heard they had an electric chair in jail but didn't see it. They took me out of jail three times and talked to me about my testimony, told me that I had to testify against Frank Hicks and Frank Moore and these other men, and that if I didn't testify against them they would do me like they did the others, beat me up. On the other trial I testified against Frank Hicks, and also Frank Moore, Ed Hicks, J. E. Knox, Ed Coleman and Paul Hall. In those cases I testified that I saw Frank Hicks fire two shots up the road toward some white gentlemen, about a quarter of a mile away, and that Frank Hicks said that he would a got that guy if it hadn't been for that horse. I didn't see Frank Hicks fire any shots at all and I didn't hear him make any such remarks. The only reason that I testified the way I did in those cases was that I was afraid that I would be beaten up if I did not do so. Before I agreed to testify as I did they took me out of jail and into a room and talked to me three times before my testimony. They told me that I had to say it, and that if I didn't do it they would beat me up as they did the others and send me to the electric chair in my own case.

——— ———,

Subscribed and sworn to before me this — day of May, 1921.

——— ———,
Notary Public.

My Commission Expires ——— —, ———.

(Copy.)

Endorsed: Filed Sept. 21, 1921. Sid. B. Redding, Clerk.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 955.

FRANK MOORE, ED HICKS, J. E. KNOX, ED COLEMAN, AND PAUL HALL, PETITIONERS,

vs.

THE STATE OF ARKANSAS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

FILED MAY 24, 1920.

(27,710)

(27,710)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 955.

FRANK MOORE, ED HICKS, J. E. KNOX, ED COLEMAN, AND PAUL HALL, PETITIONERS,

vs.

THE STATE OF ARKANSAS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

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1 FRANK MOORE, ED HICKS, J. E. KNOX, ED COLEMAN, and PAUL HALL, Petitioners,

v.

THE STATE OF ARKANSAS, Respondent.

EXHIBIT A.

2 Transcript examined and appeal granted Jan. 9th, 1920.
CARROLL D. WOOD,
Associate J. Sup. Ct.

3 Pleas Before the Hon. J. M. Jackson, Judge of the First Judicial Circuit of the State of Arkansas, Phillips County, Arkansas, October Term, 1919, November 3rd, 1919.

4495.

STATE OF ARKANSAS

against

FRANK MOORE, ED HICKS, J. E. KNOX, ED COLEMAN, and PAUL HALL.

Murder in the First Degree.

Appearances:

Jno. E. Miller, Prosecuting Attorney, 1st Dist.
John I. Moore and Greenfield Quarles, Attorneys for defendants.

4 STATE OF ARKANSAS,
County of Phillips:

Be it remembered that the Circuit Court of Phillips County, Arkansas, met at the Court House in the City of Helena, Arkansas, October 27th, 1919, at 10 o'clock A. M., it being the day fixed by law for holding said court. There was present and Presiding the Hon. J. M. Jackson, Judge of said Court, A. G. Burke, Clerk and F. F. Kitchens, when after due proclamation by the Sheriff, Court was opened when the following proceedings were had to-wit:

In the Matter of the Organization of the Grand Jury.

Now on this day comes the sheriff in open court and returns the venire heretofore issued by the Clerk of this Court for the Grand Jurors, which were selected by the Jury Commissioners at the April Term, 1919, of this Court, from which venire the following qualified

electors of Phillips County, Arkansas, were duly examined, selected and sworn as follows, to-wit:—C. L. Moore, Jr., T. W. Keesee, C. L. Bernard, J. J. Pedro, J. W. Denison, James H. Pillow, C. A. Wooten, Joseph Truemper, H. E. McRae, S. A. Wooten B. A. Dunlap S. Straub, Abe Pupkin, E. P. Govan, Jr., and Jas. C. Rembert, and Si. Frank and who having been duly sworn, were empanneled to serve as Grand Jurors at the present term of this court.

Thereupon the Court charged said Grand Jury as to their duties and appointed H. E. McRae, one of their number as Foreman; They then retired to consider of their duties.

In the Matter of C. N. Biscoe Sworn in as Special Bailiff to Grand Jury.

Now on this day comes the sheriff in open court and presents the name of C. N. Biscoe, a duly qualified elector of Phillips County, Arkansas, who having been found to possess the necessary
5 qualifications, was duly sworn as the law directs as special bailiff to the Grand Jury. He then proceeded to the discharge of his duties.

In the Matter of the Organization of the Petit Jury.

Now on this day comes the sheriff in open court and returns the venire heretofore issued by the Clerk of this Court for Petit Jurors, who were selected at the April Term 1919 of this Court by the Jury Commissioners, from which venire the following qualified electors of Phillips County, Arkansas, were selected *as* sworn as follows, to-wit:—John L. Turner, D. J. Clatworthy, A. D. Adams, Andrew Friberg, E. M. Allen, E. P. Moore, Harry Ball, E. R. Crum, J. Beilenson, John King, S. L. Mundt, and S. H. Swenson for the 1st panel, and Chas. Afflick, I. A. Metx, Tom Wallace, J. C. Brown, C. T. O'Brien, John Shepard, A. P. Collidge, Polk Agee, R. G. Foster, M. Neely, W. H. Elsesser and E. P. Bloom for the 2nd panel, who having been duly examined, were duly sworn and empaneled to serve as Petit Jurors at the present term of this Court.

The court then charged said Petit Jury as to their duties. Circuit Court Record "U" page 62, October 27th 1919.

6 In the Matter of T. W. Keese Excuse- from Grand Jury.

Now on this day by leave of the court for good cause shown, T. W. Keese is excused from further service on the Grand Jury.

In the Matter of John L. Turner Excused from Further Service on the Petit Jury.

Now on this day by leave of the Court for good cause shown John L. Turner, is excused from further services on the Petit Jury.

In the Matter of John L. Turner Empaneled as a Grand Jurror.

Now on this day comes the sheriff in open court and presents the name of John L. Turner, Esq., a duly qualified elector of Phillips County, Arkansas, who having been found to possess the necessary qualifications was duly examined sworn, and empaneled as Grand Juror at the present term of this Court.

Circuit Court Record "U," pages 65 and 66, Oct. 28, 1919.

7 Court met pursuant to adjournment Wednesday morning at nine O'clock A. M. Oct. 29th, 1919. There was present and presiding the Hon. J. M. Jackson, Judge of said Court, A. G. Burke, Clerk and F. F. Kitchens, Sheriff, when after due proclamation by the Sheriff, Court was opened when the following proceedings were had to-wit—

In the Matter of the Report of the Grand Jury.

Now on this day comes the Grand Jury in open court in a body, all answering to their names as the same were called by the Clerk, through their foreman, presented twenty-three (23) bills of indictment, each endorsed a "True Bill" and signed by the Foreman: said indictments were each filed and numbered as follows to-wit:

(Among which were)

No. 4495.

STATE OF ARKANSAS

vs.

FRANK MOORE, ED HICKS, J. E. KNOX, ED COLEMAN and PAUL HALL.

Murder in the First Degree.

No Bail.

(And Others.)

There being no further business to report said Grand Jury retired to further consider of their duties.

Circuit Court record "U," page 68, October 29, 1919.

8 *Indictment.*

Phillips Circuit Court.

STATE OF ARKANSAS

against

FRANK MOORE, ED HICKS, J. E. KNOX, ED COLEMAN and PAUL HALL.

Indictment.

The Grand Jury of Phillips County in the name and by the authority of the State of Arkansas, accuse Frank Moore, Ed Hicks, J. E. Knox, Ed Coleman and Paul Hall, of the crime of murder in the first degree committed as follows, to-wit: The said Frank Moore, Ed Hicks, J. E. Knox, Ed Coleman and Paul Hall, in the county and State aforesaid, on the 1st day of October, A. D. 1919; unlawfully, wilfully, feloniously and with malice aforethought and after deliberation and premeditation did kill and murder one Clinwhich they, the said Frank Moore, Ed Hicks, J. E. Knox, Ed Coleton Lee, by shooting him, the said Clinton Lee, with a certain gun man and Paul Hall, then and there had and held in their hands, the said gun being then and there loaded with gunpowder and leaden balls against the peace and dignity of the State of Arkansas.

JNO. E. MILLER,
Prosecuting Attorney.

Endorsed: No. 4495. State of Arkansas vs. Frank Moore, Ed Hicks, J. E. Knox, Ed Coleman and Paul Hall. A true bill. H. E. McRae, Foreman. Indictment for murder in the first degree. Filed in open court in the presence of the Grand Jurors; this 29th day of Oct. 1919.

A. G. BURKE,
Clerk,
By L. E. BERARD,
D. C.

9 Issued Bench Warrant and require Bail in the sum of No Bail.

JAMISON M. JACKSON,
Judge.

Witnesses: John Thomas, Frank Hicks, Gillmore Jenkins, Ed Mitchell, George Greer, Tom Kelley, Eddins Wooten, Carleton Meyers, Dr. O. Parker, Walter Ward.

STATE OF ARKANSAS,
County of Phillips:

I have duly served a copy of the within indictment to each of the within named defendants this Oct. 29th, 1919.

A. G. BURKE,
Circuit Clerk.

10 Original for Supreme Court.

STATE

vs.

FRANK MOORE, ED HICKS, J. E. KNOX, PAUL HALL, and ED COLEMAN.

Bill of exceptions. Filed January 3rd, 1920. A. G. Burke, Ct. Clk.

11 In the Phillips Circuit Court, November Term, 1919.

STATE OF ARKANSAS, Plaintiff,

vs.

FRANK MOORE, ED HICKS, J. E. KNOX, PAUL HALL and ED COLEMAN, Defendants.

Bill of Exceptions.

Be it remembered, that on this 4th day of November, 1919, the above and foregoing cause coming on to be heard before Hon. J. M. Jackson, Judge of the 1st Judicial Circuit of Arkansas, and a jury duly empaneled to hear the same at the regular November Term, 1919, of the Phillips Circuit Court, and the defendants, Frank Moore, Ed Hicks, J. E. Knox, Paul Hall and Ed Coleman appearing in person and by atorneys, J. I. Moore and Greenfield Quarles, and the State being represented by Hon. J. E. Miller, Prosecuting Attorney; and both parties announcing ready for trial, thereupon, said cause proceeded to trial, and the following evidence was introduced, heard and submitted; objections and exceptions to testimony; instructions asked, given, modified and given and refused, and other things had and done in said cause as follows, to-wit:

12 *State's Testimony.*

R. L. BROOKS, having first been duly sworn, was called as a witness by the State and testified as follows:

Q. Your name is R. L. Brooks?
A. Yes, sir.

Q. Did you know Clinton Lee?
A. Yes sir?
Q. Were you with him along about the 1st of October of this year?
A. Yes sir.
Q. Were you with him at the time he received an injury down here at Elaine?
A. Yes sir.
Q. Where was he at that time?
A. He was sitting in the extreme end, left side of the car, Mr. Meyers' car.
Q. In what County and State was that?
A. Phillips County, Arkansas.
Q. Was he injured there?
A. Yes sir.
Q. How?
A. By a bullet from a rifle.
Q. Where did the bullet hit him?
A. Right under his left arm.
Q. Did you see his body?
A. Yes sir; I helped to take him in the house.
13 Q. What became of Lee then?
A. Well, we took him in the house and he died in about two or three minutes after we placed him in the bed.
Q. How long was it after the bullet struck him before he died?
A. Couldn't have been over 5 minutes.
Q. Did you examine his body?
A. No sir.
Q. Did you see where the bullet went in?
A. Yes sir, I saw where it went in his clothes.
Q. And struck him under the left arm, did it?
A. Yes sir, somewhere in here (shows).
Q. Now did you hear any shots over there?
A. I don't, I can't say I heard the report of the rifle, I heard the hiss of the bullets, heard one of the bullets when it struck a little piece of iron.
Q. How many bullets did you hear?
A. Two.
Q. How long was it between the bullets?
A. Well, I imagine just the length of time it would take a man to unload and reload the gun.
Q. Pretty quick?
A. Yes sir.
Q. At that particular time what was this car that Mr. Lee was in which way was it headed?
A. It was facing towards Helena; it was not exactly straight up and down the road, it was in the process of turning around, it was almost North and South.
Q. Mr. Lee was sitting on the right hand side of the car?
A. On the left hand side of the car.
14 Q. In the seat?
A. Yes sir.

Q. Then Mr. Lee was facing northwest was he?
A. Yes sir.
Q. And the bullet struck him back here?
A. Yes sir.
Q. That would have made the bullet come from what direction?
A. From the South.
Q. And he died in a few minutes?
A. Yes sir.

Cross-examination:

Q. Who fired that shot?
A. I haven't the least idea.
Q. You neither heard the report of the gun nor saw the man that fired it?
A. No sir.

(Witness excused).

15 Dr. O. PARKER, having first been duly sworn, was called as a witness by the State and testified as follows:
Q. Your name is Dr. O. Parker?
A. Yes sir.
Q. Where do you live?
A. Elaine.
Q. What is your profession?
A. Physician.
Q. Did you know Clinton Lee?
A. I did not.
Q. You remember seeing him?
A. Yes sir.
Q. When did you see him?
A. Saw him when he was dying.
Q. When did he die? Where did he die?
A. In Mr. McCoy's house.
Q. Is that the house near where he was shot?
A. Yes sir; right in front.
Q. From what did Mr. Lee die?
A. They brought the man in dying, he was dying when they brought him in. Mr. Tappin was on the bed there and I was giving him first aid; I made no examination of his body.
Q. Did you see his body after he died?
A. Yes sir.
Q. And he died there just in a short time?
A. Yes sir, in the course of 4 minutes.
Q. Did you see the bullet hole or not?
16 A. No sir, I was busy with Mr. Tappan, and he was dead before I got away, before I got to him, before I got through with Mr. Tappan why Mr. Lee was dead.

(No cross-examination.)

17 TOM FAULKNER, having first been duly sworn, was called as a witness by the State and testified as follows:

Q. Your name is Tom Faulkner?
A. Yes sir.
Q. Where do you live?
A. I live in Helena, Arkansas.
Q. Did you know Clinton Lee?
A. Yes sir.
Q. Were you with him at the time he was killed?
A. I was probably 50 or 100 feet from him at the time he was killed.
Q. Did you hear the shots that killed him?
A. Yes sir.
Q. Where was Mr. Lee at the time he was shot?
A. Well, all the cars—he was there in one of the cars, the cars were right in front of this McCoy house, and the shots came from the South.
Q. Now did you see anybody except Mr. Lee about the time the shots were fired?
A. Yes sir, I saw three Negroes.
Q. Where were they?
A. They were probably 3 or 4 hundred yards South of this house.
Q. Where were they with reference to the road?
A. They were just off the road; a ditch runs alongside of it and they were just on top of this ditching.
Q. Did you see any of the negroes fire the shots?
A. Yes sir.
Q. How many shots did he fire?
18 A. Two.
Q. Which way was he pointing the gun?
A. Towards the car.
Q. In which direction was the man standing that shot?
A. He was facing this direction, shooting this way.
Q. He was South and shooting North then?
A. Yes sir, shooting in the direction of the car.
Q. How does the public road run there with reference to the railroad?
A. It runs right alongside of the railroad.
Q. On the East side?
A. Yes sir.
Q. And the men that you saw doing the shooting were 3 or 4 hundred yards South, down the road from the McCoy house?
A. Yes sir.
Q. Did you see any Negro or Negroes, at the time, or shortly before that, crossing the railroad?
A. I didn't see any of them crossing the railroad.
Q. Did you see any of them on the East side?
A. Yes sir.
Q. How many did you see over there?
A. Well, as I can remember there was 3, there might have been more.

Q. Do you know what kind of gun it was that you hear- fire- there?
A. It was a rifle.

Cross-examination:

Q. Did you know these three Negroes you say you saw?
A. No sir, I know they were Negroes.
Q. Which, if any, of these five defendants, did you see there?
A. I couldn't identify any of them.

(Witness excused.)

JOHN JEFFERSON, having first been duly sworn, was called as a witness by the State and testified as follows:
Q. Your name is John Jefferson?
A. Yes sir.
Q. Prior to October 1st where did you live?
A. Down at Elaine at Mr. M. P. Alderman's plantation.
Q. Do you know Frank Moore?
A. Yes sir.
Q. You know Ed Hicks?
A. Yes sir.
Q. You know J. E. Knox?
A. Yes sir.
Q. And Sweat Coleman?
A. Yes sir.
Q. You know Paul Hall?
A. Yes sir.
Q. Did you belong to the union there, Farmer's Household and Progressive Union?
A. Yes sir.
Q. What lodge do you belong to?
A. To the Elaine Lodge.
Q. Who was President of the Elaine Lodge?
A. Ed Hicks.
Q. This man over there?
A. Yes sir.
Q. Who was the secretary?
A. The secretary, I never did for certain see the secretary, the night I joined there was a call meeting, the secretary was not there but I was told Ed Baker was.
Q. Do you know who was President of it?
A. Yes sir, I have learned.
Q. Who was it?
A. Joe Knox.
Q. One of these men over here?
A. Yes sir.
Q. Do you know who the Board members of the lodge were?
A. You mean the whole record of the members?
Q. No, the Board members of the lodge?

A. I don't know none of them, no more than you called the leaders, the President, the Vice President and the Secretary.

Q. Was there any of these men there, Frank Moore, Ed Coleman, Paul Hall,—were they leaders in the lodge or not?

A. Frank Moore, I know he was there, but I don't know whether he was a leader, neither these other two you called.

Q. When you went to the lodge there what did the parties take with them?

A. Take round to the lodge?

Q. Yes, did they take guns?

A. When I went to the lodge they had guns.

Q. What was the purpose of taking the guns?

A. Said they was looking for them to come down there and pick them up.

Q. Looking for who?

A. Looking for the White folks to come down there and break the meeting up.

Q. Well, what did they have their guns for?

A. They had their guns for protection, to fight with. The first night I went there I didn't have no gun, and they asked me what did I bring to fight with and I told them I didn't — nothing
22 and this fellow says well a couple of fellows come here and broke us up.

Q. How many meetings of the lodge did you attend when these fellows were there?

A. I met only one meeting after I joined.

Q. Do you remember the night that meeting was on?

A. Yes sir.

Q. What night was it?

A. The meeting I j-ined, I j-ined Friday night before this racket come up there.

We object to any testimony two or three nights before this transaction.

Court: That will be admissible for the purpose of showing a conspiracy.

Mr. Miller: That is the purpose of it, your honor.

Court: If they do not show that it is admissible, that is if they do not connect it with this affair, the jury will be instructed to disregard it.

Mr. Moore: Please note our exceptions.

Q. You met Thursday night before this killing?

A. Yes, sir.

Q. Were these parties there that Thursday night?

A. I know Ed. Hicks was there and Frank Moore and this old gentleman, Sweat Coleman. Knox and Hall I didn't see them there.

Q. You didn't see those two there that night?

A. No sir.

Q. Did these fellows have guns there that night?

A. Yes sir.
23 Q. Were you up at Hoop Spur on Tuesday night?
A. No sir.
Q. Now where did you go Wednesday morning, October 1st?
A. There was two fellows, Tom Sane and Dave Bishop come to my house, I guess as near as I could come to it, about 4 o'clock in the morning.
Q. Where did you go?
A. I went on out to Frank Moore's.
Q. You went on out to Frank Moore's house?
A. Yes sir, Frank Moore's.
Q. Did you know where Frank lived?
A. Yes sir.
Q. Now who lived there with Frank Moore?
A. Sweat, he lived right across the road from his house, and the next house was Frank Hall.
Q. Now Frank Hall, is that Paul Hall's brother?
A. Yes sir, Frank Hall's house was closer to the other two houses than Paul's house was.
Q. What time did you get there in the morning?
A. I don't know the exact time, but it was before day light.
Q. Did you see anybody there?
A. Yes sir.
Q. How many were there?
A. I guess there was 45 or 50 they was scattered around there in the dark.
Q. What were they doing there?
A. Sitting down talking.
Q. What did they have?
A. Guns.
Q. What kind of guns?
A. Shot guns, Winchesters and this other gun 45-70's and
24 some had pistols.
Q. Now did you see these five fellows there?
A. I seen Moore; this other gentleman, Sweat Coleman, and Paul, but this here Knox and Hicks I didn't see them there before daylight.
Q. Now Frank Moore, Sweat Coleman and Paul Hall was there before daylight?
A. Yes sir.
Q. What were they doing?
A. They were all sitting down there talking.
Q. What was Frank Moore doing?
A. Frank Moore, he was there, he was in the house, passing first out doors and inside and talking.
Q. What was he saying?
A. O, I heard him come out of the house, he spoke this word, about they had been into it at Hoop Spur and they had killed a man.
Q. What else did he say.
A. He said he taken a 45 automatic and a pair of handcuffs.

Q. What did he say about you boys gathering in there?
A. He didn't say nothing then, until after daylight.
Q. Now after daylight did you see Hicks and Knox?
A. Yes sir, I seen them later up in the day.
Q. Then you saw all five of them there did you?
A. Yes sir.
Q. What were they doing there?
A. They were all there, some was over to his house and some was over to Sweat's house and some was over to Paul's house and some was around there in the bushes.

25 Q. Now what did you hear Frank Moore saying there during that morning?

A. I heard him say later up in the day, I guess it was about 12 or 1 o'clock; that was on the bridge in the road, he hollored for all of us to come on up there; he says don't you hear that shooting, he says come on and let's go up there and help them people out, and everybody come on up there, and he paired us all up.
Q. What do you mean by pairing you up?
A. Two and two.
Q. Who did that?
A. Frank Moore.
Q. Who was helping Frank Moore?
A. It was Frank Moore, Hicks and Knox.
Q. These three men over here?
A. Yes sir.
Q. They were lining you all up, two and two?
A. Yes sir.
Q. What were they telling you to do?
A. Told us all—Moore he got in front and says come on and let's go and help them people out at the shooting.
Q. What did these fellows tell you?
A. Just go up there and help them out; and he started on out through the field, through the woods towards Hoop Spur.
Q. Now who was in front you say?
A. Moore.
Q. Frank Moore?
A. Yes sir.
Q. Where was Hicks and Knox?
A. Hicks was along in the middle.

26 Q. What was he doing?
A. He was walking along with the gang.

Q. And what was Knox doing?
A. He was at the rear end.
Q. What was his business back there?
A. He was back there—he says if arry one breaks ranks he was going to shoot him down.
Q. Now that was Joe Knox?
A. Yes sir.
Q. Now where was Paul Hall at that time?
A. Paul Hall was in the gang dut I don't know where he was.

Q. Was there any of the boys gathered in there at Paul Hall's house?

A. Yes sir, some come in there, but they didn't go to his house until after day light.

Q. What was Sweat Coleman doing?

A. He was there in the gang too. He wasn't doing no more than the rest of them, around there with his gun.

Q. What kind of a gun did he have?

A. A 45-70.

Q. What was he doing with it?

A. Well, I ain't heard him say nothing.

Q. You never heard Sweat say anything?

A. No sir—I was not close to him.

Q. Which one of the men were you close to?

A. When, we was marching on up I was near to the rear end, I was not far from Ed Hicks.

Q. Frank Moore, and Ed Hicks and Knox, they had you in charge there?

A. Yes sir.

27 Q. And Coleman and Paul Hall was along?

A. Yes sir, they was along with us.

Q. Now did all these parties have guns?

A. All of them had guns.

Q. Now where did you go from there?

A. We went on and marched out through the woods, on up to the open field.

Q. Who had you in charge all that time?

A. The same fellows. And we come out through the field, we come out I guess about a quarter of a mile from the house, and we seed this crowd of men and this fellow Moore he stopped and we stopped and he says; Hicks says let's go across this way and cut them off.

Q. Cut who off?

A. These white gentlement at this house.

Q. What crowd of men was that?

A. I don't know.

Q. What kind of fellows were they?

A. White fellows.

Q. Then you started across, north——

A. About a quarter of a mile from the house where they was, we turned and went across the railroad.

Q. Who decided to turn back here to the railroad?

A. After we got to the field?

Q. Yes.

A. Ed Hicks and Frank Moore.

Q. Why were you doing that?

A. They was coming out there to go across there and cut

28 the white men off.

Q. Did you turn and go across there?

A. Yes sir.

Q. What did you do then?

A. We all went across there—some went across the railroad and some stopped on the other side.

Q. As you were crossing the railroad there, where does the public road run there?

A. The railroad and the public road, right side by side.

Q. Parallel, side by side.

A. Yes sir.

Q. On which side of the railroad did you come up from?

A. We come up from over on the West side.

Q. You were coming from the West going East?

A. Yes sir.

Q. Which side of the railroad is the public road on?

A. It is on the East side of it.

Q. Do you know where the McCoy house is there?

A. Yes sir.

Q. Did you cross the railroad there?

A. Where, we struck it, yes sir.

Q. How far from the McCoy house was it to where you struck the railroad there?

A. It is about a quarter of a mile.

Q. Which way is the McCoy house from the railroad? I mean from where you boys crossed the railroad?

A. It was north-west.

Q. As you crossed the railroad there did anything happen?

A. Yes sir, that is where this fellow made the two shots.

29 Q. Which fellow?

A. Frank Hicks.

Q. Was he in the bunch there?

A. Yes sir.

Q. Frank Hicks made the shots?

A. Yes sir.

Q. Did you see Frank Hicks when he made the shots?

A. Yes sir, I did.

Q. Where was he?

A. He was in the public road.

Q. How did he shoot?

A. Well, he just squatted that away and took aim and made two shots.

Q. What kind of a gun did he have?

A. He had one of them 45-70's too.

Q. Did he say anything?

A. Yes sir.

Q. What did he say?

We object, Frank Hicks is not on trial.

Court: I understand, but he was present with the defendants.

Mr. Moore: It is not shown he could have heard what was going on.

Q. Where was Moore then?

A. Moore, he was out there in the road too, he wasn't so far from Hicks.

Q. What was he saying?

A. I ain't heard him say nothing.

Q. But he was right there?

30 A. Yes sir.

Q. That was the man that lead you up there?

A. Yes sir.

Q. Where was Ed Hicks?

A. He was across the road, he was over in the field.

Q. How far was he from you?

A. From the fellow that shot—I guess may be he was 25 or 30 yards.

Q. Where was Sweat Coleman?

A. I don't know where he was, but he was in the gang there somewhere.

Q. You know how close he was to Frank Hicks?

A. Sweat Coleman?

Q. Yes.

A. No sir.

Q. Where was Joe Knox?

A. Joe Knox, I seen him he was on the side of the railroad.

Q. How close to Hicks?

A. He was about 15 or 20 yards from Hicks.

Q. Do you know where Paul Hall was?

A. No sir, I don't know where he was.

Q. Now at that time what did you say Frank Hicks said?

A. At the time he shot?

Q. Yes sir.

A. He made the first shot, he taken his gun down and re-loaded it, and somebody was in the gang and told him don't shoot, but I could not testify who it was, he says yes, I am going to shoot, and he threw up and made the second shot, and *and* when he made the second shot he said, I would have got that guy if it

31 hadn't been for the horse; there was a horse between him and this gentleman where he shot.

Q. After that where did you go?

A. After that we went on across, part of the gang, you see it was split all up after these two shots was made; after that all of us went down the West side of the track, and the other gang went on the other bank; we split up there after he made the shots, some went on the West side of the railroad and some went on the East side.

Cross-examination:

Q. Now you say you were all called together, and when you heard these shots, you went up the road to help the folks out?

A. Yes sir.

Q. How far was it up there to that place?

A. Oh, I don't know, I guess it was something like a mile.

Q. That was where you gathered together to help out somebody wasn't it?

A. That was where we was gathered together at, that was before we left to go.

Q. How far was it from where this shooting was done by Hicks up to where the shooting you had heard, how far was it from there?
A. From Moore's house?
Q. Yes.
A. I guess nigh a mile, or a mile or two.
Q. Where did you go after the shooting?
A. After the shooting, went over on Yellow Banks, on the West side of the road.
32 Q. When were you arrested, captured?
A. I was out there on Mr. Alderman's place.
Q. They went down there and got you?
A. Hes sir, the agent sent for us to come up here; eight or nine of us to come to his house.
Q. Who was the agent?
A. Mr. Curry.
Q. You have been indicted for murder too, here, haven't you?
A. I got one of them bills like all the rest of us got.
Q. What else did you get?
A. That's all.
Q. You got that bill all right?
A. Yes sir.
Q. What does it say?
A. The bill says murder in the first degree.
Q. Who have you talked to about this case?
A. I don't know how you mean?
Q. Did you tell somebody this story before you went on the witness stand?
A. Yes sir.
Q. Who did you tell it to?
A. I talked it around here, they questioned me down there, I don't know who it was, it was some of the gentlemen I talked to one or two before I talked to these other.
Q. Who was it said don't shoot down there when Hicks was shooting at that man?
A. I don't know somebody in the crowd, sayd don't shoot, but I couldn't testify who it was.
Q. Were you before the Grand Jury?
A. No sir, I ain't never been before the grand jury.
33 Q. You say you were not before the Grand Jury and gave your testimony?
A. I give my testimony, I don't know if it was for the Grand Jury or not. I give my testimony down here.
Q. How many men were there in the room when you were in there?
A. I don't know sir, looked like to me it was 6 or 7.
Q. What did you go into that thing for; who did you expect to kill when you went into that lodge?
A. I didn't expect to kill no one.
Q. You didn't join it for the purpose of killing anybody then?
A. No sir.
Q. When did you make up your mind to kill somebody?

A. I ain't never made up my mind to kill nobody.
Q. When did these fellows make up their minds to kill somebody?
A. I don't know when they made up their minds to kill somebody.
Q. Whose gun did Ed Hicks use in shooting at Mr. Lee?
A. I seen him with it when I first seen him, I ain't seen him get it from nobody else.
Q. You didn't see him get it from anyone else?
A. No sir, he had it when I seed him.
Q. Did Sweat Coleman have a gun at that time?
A. Yes sir, he had a 45-72.
Q. He didn't give that to Hicks to do the shooting with?
A. No sir, I ain't seen him give it to him, Hicks had one.
Q. How long have you lived down there in that country?
A. Down there at Elaine?
A. Yes?
A. I have been down at Elaine, soon be 5 years.
Q. Where did you come from when you went there?
A. I left from Helms, Miss.
Q. What County is that in?
A. Washington County.
Q. What did you do over there that you had to come over here?
A. I didn't do anything. I left there in 1914; the panic was on and I was hunting for somewhere to make a living.
Q. You think it was profitable to come over here and organize a lodge for killing people?
A. No sir, I didn't come for that.
Q. When did you find out that somebody was to be killed after you joined that lodge?
A. I didn't find out that nobody was to be killed, but I heard this Hill mention it in the lodge that it was going to be trouble, but just for to say kill somebody I never heard nothing about it?
Q. Where is Hill?
A. I don't know, that is the first time I ever seen him and the last time.
Q. Have you been looking for him since?
A. No sir.
Q. Now Hill was the man that said there was going to be trouble was he?
A. Yes sir.
Q. Did anybody else say there was going to be trouble?
A. I haven't heard anybody else.
Q. None of these fellows said that did they?
A. No sir.
Q. Did you hear any talk about killing anybody that morning when you met there before daylight?
A. No sir, I didn't hear no one say they were going to kill some body elce.

Witness excused.

35 WALTER WARD, having first been duly sworn, was called as a witness by the State and testified as follows:

Q. What is your name?
A. Walter Ward.
Q. Where did you live prior to October 1st?
A. At Dr. Cruise's.
Q. Near Elaine?
A. Yes sir.
Q. Did you know Paul Hall?
A. Yes sir.
Q. You know Frank Moore?
A. Yes sir.
Q. Ed Hicks?
A. Yes sir.
Q. Do you know Sweat Coleman?
A. Yes sir.
Q. Do you know J. E. Knox?
A. Yes sir.
Q. You belong to the Union?
A. Yes sir.
Q. The Farmer's Progressive Household Union of America?
A. Yes sir, I belong to the Union.
Q. What union did you belong to?
A. The same one they belonged to.
Q. The same one who belonged to?
A. Hicks and them.
Q. You mean these fellows over here?
A. Yes sir.
Q. They belonged to your Union?
A. No sir, I belonged to dey union.
Q. I thought you said their union?
36 A. That is who I jined under.
Q. Who had charge of the union that you joined?
A. Hills and Ed Hicks, is all I know.
Q. You saw these other fellows in the Union there?
A. Yes sir.
Q. Did they take anything with them when they went to the Union?
A. No sir, I didn't—they taken guns is all I saw.
Q. You know why they taken them?
A. They said they was looking for trouble.
Q. Who said that now?
A. That is what the head leaders said.
Q. Who were the head leaders?
A. Ed Hicks is one of them and Hill was one.
Q. This man here?
A. Yes sir.
Q. What about Frank Moore?
A. Frank Moore was one of them too.
Q. One of the leaders.
A. Yes sir.

Q. What about Knox?
A. They tell me he is Vice President.
Q. You need not tell anything unless you know it, don't tell anything anybody said or told you.

Judge Moore: We object to the leading questions he has been asking.
Objection sustained.

Q. Where were you on Wednesday morning?
A. I was at home until about half past four.
Q. Where did you go then?
A. Paul Hall woke me and told me to go to Ed Hick's house.
37 Q. This man over here?
A. Yes sir.
Q. He came to your house?
A. Yes sir, him and two more men, I didn't know the other two.
Q. Wednesday morning?
A. Yes sir.
Q. What did he tell you to do?
A. He told me to get up and I told him I was sick, and he told me to get up and come to the door and I did so, and he told me that Frank Moore sent him after me, and for me to go and wake up the President; and I told him I was sick, he says well you got to go, you will have to crawl, he says get your gun, I says it is over to old man Keys, and he says come if you ain't got no gun.
Q. What did he say he wanted you to do?
A. I didn't know what he wanted me to do until I got over there.
Q. Paul Hall sent you to Ed Hicks, the President?
A. Yes sir.
Q. And told you to go back where?
A. Told me to come on back over to Frank Moore's house, at the bridge at Frank Moore's house.
Q. Did you go?
A. Yes sir.
Q. Did you take your gun?
A. I didn't have narry one until I got there.
Q. Who did you get one from?
A. Frank Moore.
Q. How come you to get one from him?
A. He gave me a 32 Smith & Wesson.
Q. Who did, Frank Moore?
A. Yes sir.
38 Q. Did he tell you what he wanted you to do with the gun?
A. He didn't tell me until the shooting at Hoop Spur then he hollered come on, and all of us was over at Frank Hall's house and he hollored come on.
Q. Who hollowed that?
A. Frank Moore. He lines us up two deep, and he got in the lead and had Hicks near the middle and Sweat was behind.
Q. Where was Knox?

A. Knox was in the line somewhere but I couldn't tell you where.
Q. Where was Paul Hall?
A. He was in line but I couldn't tell you where.
Q. During the morning there, how long did you boys stay there?
A. We stayed there until 11 or 12 o'clock.
Q. Now during the morning did you have any conversation with Paul Hall, or hear Paul making any talks there?
A. No sir.
Q. Did you hear Frank Moore say anything?
A. Yes sir.
Q. What was Frank saying?
A. He was telling Ed Hicks that they had been to Hoop Spur and they had killed a White man at Hoop Spur and a colored one, and they took a 45 automatic off of them.
Q. What else did he say?
A. He said he wanted us to go up there.
Q. For what purpose?
A. He didn't say for what purpose, but he says let's go, he says if a man breaks ranks he was going to turn loose on him; and if they find a man picking cotton in the field, that is where they were
39 going to kill him at, right there.
Q. Did you see Sweat Coleman there?
A. Yes sir.
Q. Did you hear him talking that morning?
A. Yes sir. That was at Frank Moore's house, he had a 45-70 Sweat did.
Q. What was Sweat doing?
A. Nothing but moving this 45-70 around.
Q. What was he saying?
A. All he was saying, I got a 45-70 Sweat.
Q. What did he say he was going to do with it?
A. He didn't near say; if he did I didn't near hear him.
Q. He called it a 45-70 Sweat?
A. Yes sir.
Q. Now where did you Negroes go from there?
A. We went on across that field there, I don't know whose field it is, Mr. Archdale's I reckon, and went up to where that gang of White folks was at the house and we split there; I went on across the field, some of us went across the railroad, and some stayed on this side, and Frank Moore and Frank Hicks set down in the road.
Q. Where was Paul Hall at that time?
A. Paul Hall was over in the field on the other side of the railroad.
Q. Where was Coleman?
A. Old man Coleman was over on the other side of the road—I don't know which side.
Q. Where was Knox?
A. Up on the railroad.
40 Q. What happened there?
A. Frank Hicks made two shots.

Q. How close were you to him?
A. I was over inside of the field, about 10 yards from him.
Q. Who was the closest man to Frank Hicks?
A. Frank Moore was sitting down close to him as from here to that gentleman.
Q. Where did he shoot?
A. He shot up the road, up there, at Dr. Richardson's house down in the field, right up the road.
Q. Right up the road at the McCoy house?
A. Yes sir.
Q. Did he shoot north or south?
A. Shot north.

Cross-examination:

Q. You say you didn't have any gun?
A. No sir, I didn't have any gun.
Q. Now when you got out of bed and started to go to that house—whose house did you say you were told to go to?
A. Ed. Hick's house.
Q. You were told to go and wake him up?
A. Yes sir. Wake up all on that road.
Q. Did you go?
A. Yes sir.
Q. Who went with you?
A. Nobody didn't go with me, but some come behind me.
Q. Why didn't you stay out of that thing if there wasn't anybody there to make you go?
A. I was scared. I was scared to go to the White folks.
Q. If you were scared that was a mighty good time to make your get-away, if there wasn't anybody with you?
A. I couldn't get away from the gang when the gang come right back by my house.
Q. But you went up to his house alone?
A. All the gang was behind me.
Q. All the gang? Have you been indicted with this bunch?
A. Yes sir.
Q. What did they indict you for?
A. For some kind of murder, I don't know.
Q. Who are you accused of killing?
A. Clinton Lee.
Q. Did you shoot at Clinton Lee?
A. No sir.
Q. Did you tell anybody else to shoot at him?
A. No sir.
Q. Did you have any agreement with anybody that he or anybody else should be killed?
A. No sir.
Q. Did anyone in this affair have any agreement there with anybody else that any one would be or should be killed?
A. That was Hill's speech that night.

Q. But there was no trouble on hand then?
A. No sir, wasn't no trouble on hand then.
Q. Who after that night ever intimated that anybody was to be killed? Any one ever intimate after that night that Hill had the lodge meeting, two weeks before, that anybody was to be killed?
A. I hadn't been in there two weeks.
42 Q. Did you ever, after you joined, did ever any of the members, either these defendants or anybody else, tell you that anybody was to be killed?
A. No sir.
Q. Then the only fellow whom you ever heard discuss that was this fellow Hill who is gone?
A. That's the only man I ever heard.
Q. Did anybody tell Frank Hicks to shoot that gun?
A. No sir, George Green told him to don't shoot; he was on the railroad.
Q. What did you do after the shooting?
A. I run. Started to run and they said God damn you stop where in the hell you niggers going.
Q. Did you stop?
A. Yes sir, we stopped.
Q. Then what did you do?
A. Some of us laid down in the woods and some of us got behind stumps and laid there until Frank Moore says let's go, and we went on back down in the corn field, and when the train passed up Frank and them went on to Henry Thomas' house.
Q. Where did you go from there?
A. Went across Yellow Banks.
Q. How long did you stay down there?
A. Stayed down there until dark.
Q. Then where did you go?
A. I went on across Mr. Craig's and Mr. Crow's field and went back on the place, and Mr. Lingard got——
Q. Who was with you?
43 A. Knox was over there?
Q. Were you and Knox hunting for trouble then?
A. No sir, we was getting out of trouble.
Q. Did you say you staid there until Friday—what became of you then?
A. I come on up to Elaine and give up to Mr. Cazort and they told us niggers to come out of the bushes and stop cutting the fool.
Q. What had you been doing?
A. I hadn't been doing nothing but I was scared to go where the white folks was at.
Q. And here you are up here under indictment and you haven't done a thing.
A. No sir.
Q. What have these other fellows done to anybody?
A. I don't know as they made a shot.
Q. So far as you know they haven't done anything to anybody?

A. No sir.
Q. You woke up the President?
A. Yes sir.
Q. Was he sick too?
A. No sir, he didn't say he was.
Q. What did you tell him to do after you woke him up?
A. I told him Frank Moore sent for us to meet over at Frank Moore's house.
Q. Did you meet over there?
A. Yes sir.

Redirect examination:

Q. Who was it told you to stop?
44 A. I don't know, it was some of them hollored to us to stop.
Q. You stopped?
A. Yes sir, he says God damn you stop.
Q. Then they were ready to shoot somebody else other than white folks—you thought they were going to shoot you?
A. I know they would if I had kept going.

(Witness excused.)

45 DAVE ARCHER, having first been duly sworn, was called as a witness by the State and testified as follows:

Q. Your name is Dave Archer?
A. Yes sir.
Q. Did you belong to the Union?
A. No sir.
Q. Do you know Paul Hall?
A. Yes sir.
Q. And Frank Moore?
A. Yes sir.
Q. And Ed Hicks?
A. Yes sir.
Q. And Sweat Coleman?
A. Yes sir.
Q. And J. E. Knox.
A. Yes sir.
Q. You remember the trouble that came up down in that country?
A. Yes sir.
Q. Where were you Wednesday morning?
A. When the first trouble happened?
Q. The Wednesday morning after the Tuesday night?
A. I was in the alfalfa patch right there behind my house.
Q. Did you go any place that morning?
A. Yes sir.
Q. What time?
A. About 10 o'clock.

46 Q. Where did you go?

A. Ed Hicks sent out some men after the fellows that didn't belong to the Union to capture them and put them——

Q. Did they capture you?

A. Yes sir.

Q. You mean these negroes?

A. Yes sir.

Q. What did they do with you?

A. They carried me over and put me in Ed Hicks' squad.

Q. Where was Ed Hicks' squad?

A. Over at Paul Hall's house.

Q. How long did you stay there?

A. Just about an hour before I got away.

Q. How did you get away?

A. Hicks was pointing the way for us men to go to watch for the white people——

Q. What were they going to do?

A. He said they was going to kill the white people when they come down there.

Q. Who said that?

A. That is what Hicks told the men.

Q. Told you negroes to do that?

A. Yes sir.

Q. What did you do then?

A. I went down in the slough with them, and when we got down in the slough why I laid my weapon down and I says I will be back directly, I says you watch until I come back, and I went on down in the slough and got in the field, the way they carried me, and I went on down to Elaine, and before I got to Elaine good the white people was coming up there and so Mr. Stokes——

47 Q. You live on Mr. Stokes' place?

A. Yes sir.

Q. You got away and went where?

A. To Elaine.

Q. To whose house?

A. I went on down to Elaine and told them about they had me and I got away; I got Mr. Stayton to bring me back to his house.

Q. You have not been indicted and charged with any—you have been arrested have you?

A. No sir.

Q. Now you say Ed Hicks took charge of you when you got there—did you see Frank Moore there?

A. Frank was at his house, they first carried me to Frank's house.

Q. Did you hear Frank Make a speech?

A. Yes sir.

Q. What did he say?

A. He said he was going to do the same thing he was telling his men.

Q. To do what?

A. He was going to kill all the white people that come down that that evening.

Q. Did you see Joe Knox.
A. Preacher Knox, no sir.
Q. Sweat Coleman, did you see him?
A. He was at his house, they carried me right through his yard.
Q. Did you hear him say anything?
A. No sir, they didn't let me stop there.
48 Q. Did you see him with a gun?
A. He was setting on the gallery, he hollered, he says hello, they have got you.
Q. Did you see Paul there?
A. Paul was at his house.
Q. And then they carried you over to Paul's house?
A. They carried me over to Frank's and then they celebrated me over to Paul's house.
Q. They escorted you from one house to the other?
A. Yes sir.
Q. Had the boys left there before you did?
A. No sir, I left when that fellow Hicks over there told them all to get in the slough.
Q. Did you see Paul Hall with anything that morning?
A. He had a Winchester.
Q. Did he say anything?
A. No sir, he was watching for the white folks, he said.
Q. He said he was watching for them?
A. Yes sir.
Q. You say Ed Hicks and Frank Moore did most of the talking to you there, in your presence?
A. Yes sir.
Q. Did you hear Sweat say anything?
A. No sir, they didn't let me say anything to Sweat.
Q. Did you hear Knox say anything?
A. No sir, I didn't hear nothing of him.

Cross examination.

Q. What you say your name is?
49 A. Dave Archer.
Q. Where are you from?
A. Elaine.
Q. How long have you lived at Elaine?
A. Well, I have been with Mr. Stokes three years.
Q. Where did you come from when you went there?
A. I come from Modoc.
Q. How long — you live at Modoc?
A. I lived there about thirteen or fourteen years.
Q. Who do you live with?
A. I used to stay with Mr. Jim Harden.
Q. How long since Jim Harden lived at Modoc?
A. I don't know exactly, when I come from Mississippi over here to Modoc he was there, and I don't know how long that has been.

Q. Don't you know that Mr. Jim Harden hasn't lived at Modoc for 15 years?

A. Well, I lived on his place.

Q. Who is your father-in-law?

A. Alex Brown.

Q. When did you tell Mr. Stokes about what was going on over there?

A. Well, I told them just as soon as I got away from them.

Q. That same day?

A. Yes sir.

Q. Did you tell him who it was?

A. Yes sir, I told him who carried me over there, the 3 men, one was named Smith, but the other two boys, Dr. Cruise told me they was name- Foster, but they was strangers to me. The army man carried me.

50 Q. What did you have?

A. They made me get my gun too.

Q. What kind of a gun?

A. Shot gun.

Q. Double barrel shot gun?

A. Yes sir.

Q. Did you have it loaded?

A. No sir, I had my loads in my pocket.

Q. You have told about what other people said over there, what did you say?

A. I didn't say anything.

Q. Did you tell them that they ought not to do that?

A. I was scared.

Q. Did you say anything or not?

A. I didn't say anything, I was scared, I was studying how to get away.

Q. Were you very badly frightened?

A. Lord, yes sir.

Q. But you remember what these other fellows said?

A. Yes sir, I took good notice of what the boss mens says.

Q. Who were the boss men?

A. Mr. Hicks there and Mr. Moore.

Q. What did Knox say?

A. I didn't hear him say anything.

Q. What did he do?

A. I don't know what he did do.

Q. What kind of a gun did Knox have?

A. I never did see his gun.

Q. Have you told all you know about this case?

A. That's all I know, no more than what they done to me, as I told you.

(Witness excused.)

51 J. GRAHAM BURKE, having first been duly sworn, was called as a witness by the State and testified as follows:

Q. Your name is J. Graham Burke?
A. Yes sir.
Q. Judge, you know Sweat Coleman and J. E. Knox?
A. Yes sir.
Q. And Ed Hicks?
A. Yes sir.
Q. And Paul Hall?
A. No sir, I don't know him.
Q. Now did you have a conversation with these three men?
A. Yes sir.
Judge Moore: Who had the conversation with them?
A. Well, Mr. Mosby and myself together, I don't recall now which one.
Q. Where was that conversation?
A. In the County Judge's office down stairs.
Q. Was that a conversation or an investigation you were making?
A. It was an investigation that we were making at that time.
Q. You were acting as municipal court judge were you?
A. No, not in that sense.
Q. You were not undertaking to commit these people to jail?
A. No sir, more to find out who were in the various gangs.
Q. How did they happen to be there in your presence, who brought them?
A. We sent for them they were in jail, they were in custody.
52 Q. You sent for them and brought them out there?
A. Yes sir.
Q. Were they charged with any criminal offense?
A. Well, yes sir, warrants had been issued for them. But at that time there was no way of having them tried, Judge Moore——
Q. Did you advise these men, you or Mr. Mosby, that what they said there would likely be used against them?
A. I don't know that we did, no sir, we just merely asked them questions and they either denied them or admitted them.
Q. They were not put on notice that you were making an investigation to ascertain whether they were criminally responsible?
A. No sir. The questions were merely asked, and they either had the right to answer or deny them.
Q. You knew they were under arrest?
A. Yes sir.
Q. And you had them brought in by an officer?
A. Yes sir.
Q. And an officer was present?
A. Yes sir. I don't know that the particular officer that brought them in was present——
Q. I am not asking you about the particular officer.

(End of Judge Moore's examination.)

Q. Was there any coercion used in talking to these negroes?

A. No sir.
Q. Any promise of reward made to them?
A. If anybody made them any promises I don't know it, I didn't.
53 Q. Were their statements or not made voluntarily to you?
A. Yes sir.
Q. Or there in your presence?
A. Yes sir.
Q. Did you indulge in any tactics that cause them to make any statements through fear?
A. No sir.
Q. At that time or at any other time?
A. No sir.

Recross-examination:

Q. Were they handcuffed?
A. No sir.
Q. Did anybody else use any coercion?
A. No sir.
Q. Was there any coercion, to your knowledge, used at any time before they were brought before you?
A. Not that I know of Judge Moore. There wasn't any used in my presence.

Redirect examination:

Q. Judge Burke, you say you heard Sweat Coleman make statements concerning his connection with it?
A. Yes sir.
Q. Just tell the jury what he said about it?
A. As well as I remember Mr. Mosby or myself one asked him if he was a member of the Union and he admitted that he was,
54 and we asked him when he received knowledge of the fact that there had been a man killed at Hoop Spur, and admitted that he found it out the next morning, and that he was either at Frank Moore's or Paul Hall's house, and that they ganged up there and after the shooting up at Hoop Spur they went up there with the gang.
Q. Did he say anything about having a gun?

We object, let the witness state.

A. Well, I don't remember, recall what kind of a gun he said he had, I remember he made the statement that he had a gun, but I don't remember what kind.
Q. Did he say anything about where he went?
A. O-, yes, he told us where he went, that after he left there—

We object to that as leading.
Court: Yes, this is an intelligent witness.

A. If you wish for me to go into deatils I will do so. He made the statement that whoever it was, I have forgotten now who he said notified him, but any way he went up to Frank Moore's house or Paul Hall's house and they set around there, and different ones of them ganged around there until 11 or 12 o'clock, when the shooting happened at Hoop Spur—the gang organized and went towards Dr. Richardson's place, and that when they got up to the railroad track there, Sweat told about these two shots being fired. I don't recall now whether he told who it was that made the shots, but there was two shots made there he said, and they split up there and went on each side of the railroad, on which side of the track Sweat was I don't remember what he said about that, whether he said he went towards Yellow Banks or on the other side of the railroad.

55 Q. He told you about the two shots?

A. Yes sir, he was up there and said these two shots were made.

Q. What about Knox?

A. Well, Knox's statement was practically the same as Sweat's so far as that point is concerned; that he went up there with the gang, that he got with them and went up towards Dr. Richardson's; as to where he said he was when these shots were made, I don't recall.

Q. Did he say he went up there with the gang?

A. Yes, he admitted that he went up there with the gang.

Q. Now what about Ed Hicks?

A. Well, Ed Hicks' statement was about the same, that he was in the gang that went towards Mr. McCoy's house; and after he got up there these shots were fired; that he took a gang of negroes and went on one side of the railroad—seems that the crowd split there, according to his statement part followed Frank Moore and some went with him and went back toward Yellow Banks, but he admitted being in the gang that went up there.

State rests.

Defendant rests. (Defendants offered no testimony.)

56 *Instructions.*

Oral.

Thereupon, the Court orally instructed the jury as follows:

"Gentlemen of the jury, the defendants, Frank Moore, Ed Hicks, J. E. Knox, Ed Coleman and Paul Hall have been indicted by the grand jury of your county charged with the crime of murder in the first degree, committed as follows, towit: The said Frank Moore, Ed Hicks, J. E. Knox, Ed Coleman and Paul Hall, in the County and State aforesaid, on the 1st day of October, A. D. 1919, unlawfully, wilfully, feloniously and with malice aforethought and after deliberation and premeditation did kill and murder one Clinton Lee, with a certain gun which they, the said Frank Moore, Ed Hicks, J. E. Knox, Ed Coleman and Paul Hall, then and there had and

held in their hands, the said gun being then and there loaded with gun powder and leaden balls.

Under this indictment, gentlemen, it is sufficient, if the proof justifies it, to convict the defendants of murder in the first degree, or to convict them of murder in the second degree or to acquit them.

Murder is the unlawful killing of a human being in the peace of the State with malice aforethought either express or implied; the manner of the killing is not material, further than it may show the disposition of mind or the intent with which the act was committed. Express malice is that deliberate intention of mind to unlawfully take away the life of a human being, which is manifested by external circumstances capable of proof. Malice shall be implied when no considerable provocation appears, or when all
57 the circumstances of the act manifests an abandoned or wicked disposition. The killing being proven, the burden of proving circumstances of mitigation that justifies or excuses the homicide shall devolve upon the accused, unless by the proof upon the part of the prosecution it is sufficiently manifest that the offense amounted only to manslaughter, or that the accused was justified or excused in committting the homicide. All murder which shall be perpetrated by means of poison or by lying in wait, or by any other kind of wilful, deliberate, malicious or premeditated killing shall be deemed murder in the first degree; all other murder shall be deemed murder in the second degree. You will observe that in order to constitute murder in the second degree it is neccessary to show that the killing was unlawful and done with malice aforethought; it is immaterial for how long the malice existed so that it existed and preceded and caused the homicide. No deliberation and premeditation is necessary in murder in the second degree; to raise it to murder in the first degree there must not only be malice aforethought, but the specific intent to kill and premeditation and deliberation, and premeditation means thought of before hand; deliberation means the having in mind the consequences of a course of conduct as distinguished from acting on a sudden impulse without the exercise of the reasoning powers. It is immaterial how long the premeditation and deliberation exists so that it existed and preceded the killing. In other words, gentlemen of the jury, the distinction between murder in the first degree and murder in the second degree, is that in murder in the second degree there need not be specifi intent to take human life at the time the fatal shot
58 is fired. Nor need there be any premeditation or deliberation; that is the distinction between murder in the first and murder in the second degree; in murder in the first degree it must be done with malice aforethought and with premeditation and deliberation, and with the specific intent to take human life at the time the fatal shot is fired.

The defendants in this case, gentlemen, are indicted for murder or rather are charged in the indictment with murder in the first degree; they are indicted as principals, under this section of the Statute: One who aids, assist, abets, advises or encourages shall be deemed in law a principal, and be punished accordingly. So, if you

find from the evidence in this case that the defendants, Frank Moore, Ed Hicks, J. E. Knox, Ed Coleman and Paul Hall were present at the time that Clinton Lee was killed, and that they, or either of them, aided, assisted, abetted, advised or encouraged the commission of the offense, and were present at the time the offense was committed, then you will find them guilty as charged in the indictment, and the punishment is the same as the principal.

If you find from the evidence in this case that the defendants are guilty as charged in the indictment, or rather that some of the defendants are guilty, it is your duty to find the ones guilty that the evidence shows is guilty beyond a reasonable doubt and to exonerate or acquit the ones that you have a reasonable doubt as to their guilt, in other words, you may find all of the defendants guilty, or a part of them guilty, one or any number of the defendants guilty; and you can find them guilty of murder in the first degree or guilty of murder in the second degree; and if you find from the evidence that the defendants are guilty but entertain a doubt as to whether they are guilty of murder in the first
59 degree or guilty of murder in the second degree, then it becomes your duty, under the law, to give the defendants, or defendant, the benefit of that doubt, and find them guilty of the lower or lesser degree; that is or murder in the second degree; and if upon the whole case you should entertain a reasonable doubt as to the defendants' guilt, you should give them the benefit of that doubt and find them not guilty.

If you find from the evidence in this case that the defendants are guilty as charged in the indictment, the form of your verdict will be: We, the jury find the defendants (giving the names of the ones you find to be guilty) guilty as charged in the indictment, of murder in the first degree, and sign it by one of your number as foreman. In the event that you return that kind of a verdict, the law fixes the punishment, which is death by electrocution; and the other form of your verdict for murder in the first degree is: "We, the jury, find the defendants (naming them) guilty as charged in the indictment, of murder in the first degree, and fix their punishment at life imprisonment in the State Penitentiary." In other words, gentlemen, it is optional or in the discretion of the jury as to whether the death penalty or life imprisonment is inflicted, in the event you should find the defendants guilty of murder in the first degree.

If you find the defendants guilty of murder in the second degree, the form of your verdict will be: We, the jury, find the defendants, (naming them) guilty of murder in the second degree and fix their punishment"—confining them to the Penitentiary for some
60 period of years, not less than five nor more than 21 years.

If upon the whole case you should entertain a reasonable doubt of the defendants' guilt you should give them the benefit of that doubt, and in that event the form of your verdict would simply be: We, the jury, find the defendants not guilty."

Gentlemen of the jury, you understand that under this indictment, where there are five defendants indicted charged with murder in the first degree, you can find one of the defendants guilty of

murder in the first degree, and one guilty of murder in the second degree and find some of them not guilty, or just as the evidence shows in the case. Under this indictment they are indicted jointly, and where the evidence is not sufficient to warrant the conviction of murder in the first degree, you can find them guilty of murder in the second degree, that is one or more; or if the evidence is not sufficient to warrant a conviction of murder in the second degree, of one or more of them, and you have a reasonable doubt of their guilt, as stated to you before, you should give them the benefit of it and acquit them.

The State is required to prove all of the material allegations in this indictment as in all criminal cases and to prove them to your minds beyond a reasonable doubt, and if the jury should entertain a reasonable doubt as to any material allegations in this indictment, they should give the defendant or defendants the benefit of that doubt and acquit them. A reasonable doubt, gentlemen of the jury, is not a mere possible or imaginary doubt, because everything relating to human affairs and depending upon moral evidence is
61 open to some possible or imaginary doubt, but it is such a doubt as would cause a prudent man to pause or hesitate in the graver transactions of life, and a juror is satisfied beyond a reasonable doubt if from a fair and candid consideration of all the evidence he has an abiding conviction of the truth of the charge.

The defendants in this case, as in all others of a criminal nature, where a person is charged with a criminal offense, is presumed to be innocent, and that presumption attends and protects him until such time as it is overcome by legal and competent evidence upon the part of the State. The fact that an indictment has been returned against these defendants should not be considered by you in determining their guilt or innocence; they are presumed to be innocent of the crime of which they are charged until each and every material allegation in the indictment is establishment to the minds of each and every member of the jury beyond a reasonable doubt."

To which oral instruction, given to the jury by the court, defendant, at the time, duly excepted and caused his exceptions to be noted of record.

These were all the instructions in the case.

62 Thereupon, the jury retired to consider of its verdict and presently returned into open court the following verdict.

Verdict.

We, the jury, find the defendants, Frank Moore, Ed Hicks, J. E. Knox, Ed Coleman, Paul Hall guilty of murder in first degree as charged in the indictment.

JNO. P. MILES,
Foreman.

To which verdict of the jury counsel for defendants, at the time, duly excepted and caused their exceptions to be noted of record.

Thereupon, counsel for defendants, in due time, presented to the court a motion for a new trial, which said motion is in the following words and figures, to-wit:

63 *Order.*

Now on this the 20th day of December 1919 the above and foregoing motion for a new trial coming on to be heard before the Court and being presented to the Court, after argument of counsel, and the Court being fully advised in the premises, and after due consideration of the same, the court doth overrule and deny said motion for a new trial; to which ruling and action of the Court in overruling and denying said motion for a new trial, the defendant, at the time, duly excepted and caused their exceptions to be noted of record.

Thereupon, the defendants prayed an appeal from the judgment and order of the Phillips Circuit Court to the Supreme Court of Arkansas, which said prayed for an appeal was by the Court granted, and time being asked, 60 days was by the Court granted from and after November — 1919 to the defendants within which to prepare, tender and file their bill of exceptions herein.

64 *Certificate.*

Now on this day comes the defendants, by their attorneys, Murphy and McHaney and Scipio Jones, and presents to the Court this their bill of exceptions herein, and the same upon examination by the court, being found to contain all the evidence introduced, heard or submitted; all exhibits introduced in testimony and offered in testimony and refused; all objections and exceptions to testimony, all instructions asked, given, modified and given and refused; the motion for a new trial and the Court's order overruling the same; and to contain all proceedings had and done in said cause, and to be in all things correct, the same is by the court approved and ordered filed as a part of the record in this cause.

Given under my hand this the 30th day of December 1919.

JIMASON M. JACKSON,
Judge of the First Judicial
Circuit of Arkansas.

65 Court met pursuant to adjournment Monday morning at nine o'clock a. m. November 3rd 1919.

There was present and Presiding the Hon. J. M. Jackson, Judge of said Court, A. G. Burke, Clerk and F. F. Kitchens, Sheriff, when after due proclamation by the Sheriff Court was opened when the following proceedings were had to-wit:

STATE OF ARKANSAS

vs.

FRANK MOORE, ED HICKS, J. E. KNOX, ED COLEMAN and PAUL HALL.

Murder in the 1st Degree.

Now on this day comes the State of Arkansas by its Prosecuting Attorney Jno. E. Miller, Esq., and the defendants in person and by attorneys John I. Moore, and Greenfield Quarles, Esquires, the defendants having been arraigned plead not guilty, whereupon come Jno. P. Miles, W. C. Gardner, J. L. Shenep, F. Murry, Arthur Miller, Walter Sanders, Harry Ball, A. Friberg, J. D. Clatworthy, John King, Tully Horner and M. Neely, twelve good and lawful jurors who having been duly sworn and examined were impaneled to try the issues in this cause, when after having heard the evidence, the instructions of the court and argument of counsel, retired to consider of their verdict, when after a short deliberation, returned into court with the following verdict.

"We, the jury find the defendants Frank Moore, Ed Hicks, J. E. Knox, Ed Coleman and Paul Hall, guilty of murder in the first degree as charged in the indictment."

(Signed.) JNO. P. MILES,
Foreman.

It is therefore considered, ordered and adjudged by the court that the defendants Frank Moore, Ed Hicks, J. E. Knox, Ed. Coleman and Paul Hall are guilty of murder in the first degree.

Circuit Court Record "U", page 79, November 3rd 1919.

66 Court met pursuant to adjournment Tuesday morning at nine o'clock a. m. Nov. 11, 1919. There was present and presiding the Hon. J. M. Jackson, Judge of said Court, A. G. Burke, Clerk and F. F. Kitchens, Sheriff, when after due proclamation by the Sheriff, Court was opened when the following proceedings were had to-wit:

4495

STATE OF ARKANSAS

vs.

FRANK MOORE, ED HICKS, J. E. KNOX, ED COLEMAN and PAUL HALL.

Murder in the 1st Degree.

Now on this day the defendants were brought into Court and no legal cause being shown why sentence of the court should not be pro-

nounced against them; It is therefore considered, ordered and adjudged by the Court that the defendants Frank Moore, Ed Hicks, J. E. Knox, Ed Coleman and Paul Hall, be delivered to the keeper of the Penitentiary of the State of Arkansas, who shall keep said defendants until the 27th day of December, 1919, when between the hours of sun rise and sun set, said defendants are to be electrocuted until dead, dead, dead.

Circuit Court Record "U", page 109; Nov. 11, 1919.

67 Motion for New Trial.

Defendants, Frank Moore, Ed Hicks, J. E. Knox, Ed Coleman and Paul Hall, jointly and severally move and pray the court to set aside the verdict of the jury herein and grant them and give to them a new trial herein for the following reasons:

1.

They are all Negroes, of the African race, and were at the time of the trial, and for a long time previous thereto had been citizens of the United States and of the State of Arkansas, and residents of Phillips County; that the deceased, Clinton Lee, whom the defendants are charged by the indictments with murdering, was killed on the 1st of October, 1919, by some person unknown to the defendants in a deadly conflict following a disturbance between the White and black races of said County on the night previous, for which they were in no way responsible; that the excitement of the white residents and citizens of said County was intense, and their feelings against the blacks, including the defendants, bitter, active and persistent; that in the course of it, some four or five white men and a large number of negroes were killed, from 50 to 60; that on or about said 1st day of October, 1919, defendants were, along with many other negroes, two hundred or more, taken into custody by said whites, carried to the County jail and there kept in close custody and confinement until they were indicted and put upon trial; that at the time of the returning of the indictment and of said trial, said excitement and bitterness of feeling among the Whites of said County against the negroes, especially against defendants, was unabated, still at the height of intensity; that this feeling among the whites was co-extensive with the County; that during their confine-
68 ment they were frequently subjected to torture for the purpose of extracting from them admissions of guilt, as others then also in custody, to force them to testify against defendants; that they were given no opportunity to consult with friends or to seek assistance for defense or relief nor were they even informed of the charg against thm until after their indictment; that while they were thus confined several hundred white men of said County assembled at or near the Court Hause and jail for the purpose of mobbing them, and were only prevented from doing so as defendants are informed and believe, by the presence of the U. S. soldiers; that the indictment was returned on the 29th day of October by the

grand jury composed wholly of white men; that on the 30th day of the same month subpœnaes for the State's witnesses were issued, to appear and testify in their case on the 3rd of November following; that on said 3rd of November, without ever having been permitted to see or talk with an attorney or any other person in reference to their defense, they were carried from the jail into the Court Room and put on trial the court appointing an attorney for them, before a jury composed wholly of white men; that the excitement and feeling against the defendants among the whites of said County was such that it was impossible to obtain any unprejudiced jury of white men to try them and that no white jury being fairly disposed, would have had the courage to acquit them; that the trial proceeded without consultation on their part with any attorney, without any witnesses in their behalf and without an opportunity on their part to obtain witnesses or prepare for defense; that no evidence was offered in their behalf; that they had no
69 knowledge or familiarity with court procedure, had never been at a trial in court before and had no definite idea of their rights therein and no conception of what steps should be taken for their protection; that the whole course of the trial, from beginning to end, occupied about three fourths of an hour; that the jury after hearing the State's evidence and the Court's charge retired and returned immediately, that is, within about from three to six minutes, with a verdict of guilty against the defendants.

Defendants, Ed Hicks, J. E. Knox, Ed Coleman and Paul Hall further say, that no copy of the indictment was ever served upon them, nor upon any attorney for them, and defendant Frank Moore says that a copy of said indictment was delivered to him on the day preceeding the trial but not 48 hours before the trial; and they all say that they never consented to waive such service nor requested nor consented to the trial without the same. Defendants, therefore, say that they were convicted and sentenced to death without due process of law.

2.

That under the law as it has existed for many years, the Circuit Courts of the State, at each Term, appoint jury Commissioners to select grand and petit jurors to serve at the succeeding term, and for more than thirty years it has been the unbroken practice of said courts to appoint only white men on such commissions, and of such commissioners to select only white men for grand and petit jurors for the succeeding terms,—constituting a discrimination, in the administration of the law against the negroes on account of their color and of their being members of the African race; and
70 that if in the course of the court's proceedings, it became or becomes necessary to issue a venire for talismen, to the sheriff, the unvariable course is, and has been, to summon only white men; this practice with reference to the selection of grand and petit jurors and the summoning of talismen prevails and has prevailed in the Circuit Court of Phillips County with unbroken uniformity to the extent that no negro has been appointed a jury

commissioner, or selected to serve as a juror, either grand or petit, for more than thirty years, and that no negro has been appointed to or has sat upon any jury in said court at any time during such period; that the Negro population of said County exceeds the white population at least five to one and that among them are a great many men possessed of intellectual, moral and legal qualifications for jury commissioners and for Grand and petit jurors, and that they are excluded therefrom solely on account of their race and color; that the defendants have thus been by said discriminating practices and by said trial, deprived of their rights under the Constitution of the United States, and especially the 14th Amendment thereto, and were, in and by said trial and proceedings, and still are, denied the equal protection of the law.

Defendants further say that while it is true, as they are now advised, that the proper and regular place and time to have objected to the grand jury, and to the indictment returned by it, would have been before the trial, yet as before stated, they knew nothing about such proceedings or the proper order thereof, and were given no opportunity to object to the grand jury or any member thereof and knew nothing of their right to raise any objection to either
71 grand or petit jury, and nothing about how to challenge or to object to either of them and were not advised in that regard; and that they, therefore, feel that their objection, taken at this time should prevail to the extent of securing them a new trial.

Third.

That the verdict is contrary to the law and the evidence and is not supported by sufficient evidence. Defendants say that for the purpose of proving the statements in the first and second grounds of this motion, they have ascertained the names of the jury commissioners at the various terms of this Court from 1905 to 1919, inclusive, beginning with:

Jas. A. Tappan, S. A. Wooten, S. C. Moore, W. A. Short, Lee Pendergrass, A. N. Tanner, M. A. Short, E. S. Ready, R. E. Chew, James Clopton, G. H. Friberg, Albert Tanner, J. I. McRee, W. A. College, H. W. Mosby, R. E. Chew, Jr., T. J. Tanner, B. L. Lyford, Asron Meyers, Amos Jarman, H. C. Coolege, Ben Lyford, Sam Solomon, W. W. Richardson, Jos. Mays, Dade Moore, Gray King, Oscar Reyburn, H. D. Moore, J. D. Mays, W. M. Straub, J. N. Ware, Jas. R. Lanier, B. J. Cunningham, Louis Solomon, R. L. Lyford, Hugo Mundt, C. P. Sanders, J. M. Hudson, B. F. Davidson, E. C. Hornor, E. J. Landon, E. N. Allen, B. J. Cunningham, J. L. Solomon, C. L. Moore, Jr., W. M. Richardson, Greenfield Quarles, S. L. Mundt, Morris Hanft, Jos. C. Meyers, Wellford White and D. T. Hargraves; also A. C. Burke and J. R. Rush who have served as clerk of this court for many years in succession; also Henry Jones, —— Jackson, E. C. Morris, Henry Avan, R. B. Campbell and J. S. Drew,—now
72 pray that they may be summoned to testify on the hearing of this motion, and that they may be permitted to prove said statements.

Fourth.

Because the court erred in rendering judgment and sentences against the defendants.

Defendants further pray that the verdict and judgment herein against them be set aside and that they be granted a fair and impartial trial.

MURPHY & McHANEY AND
SCIPIO JONES,
Attorneys for Defendants.

We and each of us state that the matters and things herein stated are true and correct to the best of our knowledge and belief.

ED COLEMAN. his X mark

ED X HICKS. his mark

PAUL HALL. his X mark

FRANK MOORE.

J. E. KNOX.

Subscribed and sworn to before me this the 18th day of December, 1919.

MARTIN L. BARNETT,
[SEAL.] *Notary Public.*

C. E. Mch. 20, 1923.

Endorsed: Filed Dec. 20, 1919. A. G. Burke, Clerk.

73 ALF BANKS, JR., being first duly sworn, on his oath says:

I am a negro. I was living in Phillips County, Arkansas, up to the 1st of October 1919, when I was arrested and thereafter kept in custody, until after I was sentenced to death, on a charge of murdering W. A. Adkins. I was then sent to the State Penitentiary for execution and am now in the custody of the keeper of the Penitentiary. I was never told of the charge against me, until I was indicted. I was put in the County jail at Helena and kept there in close confinement, with no opportunity to see or confer with anyone about my defense. A large number of negroes, a hundred or more were held in custody there with me during all that time. I was frequently whipped with great severity, and was also put into an electric chair and shocked, and strangling drugs would be put to my nose to make me tell things against others, that they had killed or shot at some of the white people and to force

me to testify against them. I had not seen anything of the kind, and so told them, at first; but they kept on, and tortured me so that I finally told them falsely that what they wanted me to say was true and that I would testify to it. They would have me blindfolded when torturing me. Once they took me up stairs, put a rope around my neck, having me blindfolded, pulled on the rope, and one of them said, "Don't knock the trick out yet, we can make him tell," or words to that effect. That feeling that they would kill him, he agreed to tell what they wanted him to. That they would go over it and tell him that he knew that was so, and that he had to tell it. During the trials, at one or two of them, they took me from the jail to the Court-room to testify against them; I think it was the trial of Joe Fox and Albert Giles, and I think also against one or two others. As they were taking me to the court room, they told me if I changed my testimony or did not testify as I had said, when they took me back, they would skin me alive.

74 I testified as I had told them in the same way they had made me tell, as near as I could. It was not true; it was false. This whipping and torturing was known generally among the negroes there in custody, and it was known what it was for, to make testify. I know that they so whipped and tortured a great many of them. But cannot say that they whipped them quite all. The- used negroes they had in or about the jail to do most of the whipping, but some white men would be present. One of the Negroes who did part of the torturing was Kid Collins, who seemed to be a trustee about the jail. Many of the scars from this torturing are still upon my body. I would never have testified falsely as I did if I had not been made to do it.

his
ALF X BANKS.
mark

Witness to mark:
J. R. BOOKER.

Subscribed and sworn to before me this the 18th day of December, 1919.

J. R. BOOKER,
Notary Public.

[SEAL.]

My commission expires Jan. 31st, 1923.

Endorsed: Filed December 20th, 1919. A. G. Burke, Clerk.

75 WILLIAM WORDLOW, being duly sworn on oath, states:

I am now in the custody of the keeper of the Arkansas State Penitentiary, under sentence of death, on the charge of murdering W. A. Adkins. I was taken in custody by white men on or about the 1st of October, last, and was held in custody until sometime in November following when I was sentenced. I was kept in close confinement in the jail at Helena, and was not told of the

charges against me until after or about the time I was indicted. There were a great many negroes, more than a hundred in the same jail with me. I was not permitted to see my friends, talk with them, or do anything towards preparing any defense. While in custody there, I was frequently taken from the cell, blindfolded, whipped and tortured to make me tell things I did not know, and furnish false information, and testify against other of the negroes. They whipped and tortured all or nearly all of the negroes in the same manner and for the same purpose. They would usually have negroes, either other prisoners or trustees about the jail, to actually do the whipping and torturing, though some white men would be present. One of the negroes they thus used, was Kid Collins, and I think another one was named Dalzell. I did not learn and did not know any of the other names. All of the other negroes knew of this whipping and torturing and the purpose of it, and most, if not all of them, were treated in the same way. They, the officers would tell me that I knew things that I did not know, and that I had to tell it or they would kill me. To escape from the torture, I finally said what they wanted me to say. When they would take us before the grand jury, if we did not testify as they wanted us to, we would be taken out and tortured again, and I have many of the scars still on my body, which can be seen by anybody who desires to see them. I was taken from the jail up into the court room to testify against
76 Ed ware, about the killing of W. A. Adkins, and other matters, and probably against one or two others. I was so bothered and so overcome that I cannot recollect with certainty. I know that I testified against Ware and that what I so testified, was not true, it was false, and I would — have so testified, if I had not been forced to. All that I said against him or against any one else, was forced. I do not know of any negro who killed or advised or encouraged the killing of either Mr. Adkins, Mr. Lee, Mr. Tappan or any one else, and would not have voluntarily testified that I did. As I was taken to the court-room, I was given to understand that if I did not testify as they had directed, I would be killed.

his
WILLIAM X WORDLAW.
mark

Witness to mark:

J. R. BOOKER.

Subscribed and sworn to before me this the 18th day of December, 1919.

[SEAL.] J. R. BOOKER.
Notary Public.

My commission expires Jan. 31st, 1923.

Endorsed: Filed Dec. 20, 1919. A. G. Burke, Clerk.

77 4495.

STATE OF ARKANSAS

vs.

FRANK MOORE, ED HICKS, J. E. KNOX, ED COLEMAN and PAUL HALL.

Murder in the 1st Degree.

Now on this day comes the defendants by attorneys Murphy & McHaney and Scipio Jones, Esq., and by leave of the Court file motion for a new trial in this cause, which said motion coming on to be heard and the court being well and sufficiently advised as to what order to render herein doth overrule said motion, to which action of the court in overruling said motion the defendant- at the time excepted and asked that their exceptions be noted of record which was done, and defendants prayed an appeal to the Supreme Court of Arkansas, which was granted, and defendants are allowed 60 days within which to prepare and file their bill of exceptions.

Circuit Court Record "U," page 122, December 20, 1919.

78 *Certificate.*

STATE OF ARKANSAS,
County of Phillips:

I, A. G. Burke, Clerk of the Circuit Court in and for the County and State aforesaid, do hereby certify that the foregoing 70 pages of typewriting contain true and perfect copy transcribed from the records and proceedings had in the Circuit Court of said County, in the cause therein stated, and I do so certify.

In testimony whereof, I have hereunto set my hand and seal of office, at Helena, Arkansas, this the 8th day of January, A. D. 1920.

[L. S.]

A. G. BURKE,
Circuit Clerk,
By L. E. BERARD,
D. C.

Endorsements: No. 2416. Frank Moore, Ed Hicks, J. E. Knox, Ed Coleman and Paul Hall vs. The State of Arkansas. Phillips, J. M. Jackson, J. Transcript. Filed January 9, 1920. W. P. Sadler, Clerk. By C. R. Stevinson, D. C.

79 STATE OF ARKANSAS,
In the Supreme Court, ss:

Be it remembered, that at a term of the Supreme Court of the State of Arkansas, begun and held on the 24th day, being the fourth Monday of November, A. D. 1919, at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit: On the 22nd day of March, 1920, a day of said term:

No. 2416.

FRANK MOORE, ED HICKS, J. E. KNOX, ED COLEMAN, and PAUL HALL, Appellants,

v.

THE STATE OF ARKANSAS, Appellee.

Appeal from Phillips Circuit Court.

This cause being regularly called, come the parties thereto by their attorneys, and said cause is submitted upon the transcript of the record, the briefs filed and upon oral argument, and is by the court taken under advisement.

80 November Term, 1919.

(Caption Omitted.)

March 29, 1920.

This cause came on to be heard upon the transcript of the record of the circuit court of Phillips county, and was argued by counsel, on consideration whereof it is the opinion of the Court that there is no error in the proceedings and judgment of said circuit court in this cause.

It is therefore considered by the Court that the judgment of said circuit court in this cause rendered be, and the same is hereby, in all things, affirmed with costs.

It is further considered that said appellee recover of said appellants all her costs in this court in this cause expended and have execution thereof.

81 In the Supreme Court of Arkansas, March 29, 1920.

No. 293.

HICKS

v.

STATE OF ARKANSAS.

MOORE et al.

v.

STATE OF ARKANSAS.

Opinion.

SMITH, *J.*:

Appellant Frank Hicks was indicted for murder in the first degree, alleged to have been committed by shooting one Clinton Lee,

and at his trial was convicted of that crime. Appellants Frank Moore, Ed Hicks, J. E. Knox, Ed Coleman, and Paul Hall, were indicted for the same crime, and were tried together, and were all convicted of murder in the first degree. Appeals have been perfected from both judgments, and as the questions raised are substantially the same in each case we dispose of both with one opinion.

It is insisted as ground for reversal in each case that appellants, who are all men of color, were discriminated against on that account, in that no colored man sat, or was summoned to serve, upon either the grand jury which returned the indictments or upon the petit juries which tried the cases, and that no colored man had served on any jury in Phillips county—where the trials occurred—for many years. This assignment of error is answered by saying that the question was first raised in the motion for a new trial, and it, therefore, comes too late to be now considered. Tillman v. State, 121 Ark. 322; Eastling v. State, 69 Ark. 189.

It is also insisted on behalf of all the appellants that the
82 verdicts are contrary to the law and the evidence, and are not supported by sufficient evidence, and that the trials occurred under such circumstances as that appellants have been convicted without due process of law. The facts upon which these contentions are chiefly made were not developed at the trial but are brought into the record by affidavits filed in support of the motions for new trials.

Discussing these questions together, it may be said that appellants, together with many other men of their own race, were members of an organization known as the Farmers Progressive Household Union of America. According to the affidavits filed in support of the motions for new trials, this was a fraternal and social organization, organized for the lawful purpose of promoting the financial interests of its members; that it met in secret, excluding all persons except those who had been properly initiated, but according to the testimony on behalf of the State members were told upon their initiation to expect and prepare for trouble with the white people. Members went armed to the meetings, and armed pickets were placed about the church in which the meetings were held to prevent persons not members, fortified with the password, from approaching the building. While one of these meetings was in progress an automobile containing three white men passed along the public road near this building, and stopped some forty or fifty yards from it, whereupon the pickets fired into the car and killed one of the men in it.

At the trials from which these appeals come the following
83 facts were developed. Early in the morning after the killing of the man in the car a number of the lodge members, probably as many as fifty, including appellants, assembled at or about the houses of appellants Moore, Hall and Coleman, about a mile from Elaine and Hoop Spur, where the shooting of the night before had occurred. All, or practically all, of the members were armed, and appellant Moore made the statement that they would kill the white people who came there. All of this is admitted, but it is explained that the members had gathered only to resist an attack being made

on themselves and that they intended to kill the white men whom they expected to come only to prevent the white men from killing them.

Sometime between 11 a. m. and 1 p. m. firing near Elaine or Hoop Spur was heard, whereupon appellants, with a number of others, fell into line, and proceeded to march toward Elaine, Moore having said, as they fell into line, that some of their members were being attacked and that they would go and help them fight. As they marched along by twos and fours they crossed a railroad, and, as they did so, they observed, at the home of one McCoy, a white man, about a quarter of a mile away, a number of white men standing in the road at McCoy's house or seated in the cars which had stopped there on the road-side. When they observed the white men appellant Frank Hicks said he would shoot at them. He knelt, took aim and fired two shots, one of which struck Clinton Lee, who died just after he was carried into McCoy's house. These shots were fired from a high-powered rifle, and at such distance away that some of the white men standing near Lee stated that they did not hear
84 the report of the gun which killed him. This party of white men consisted of officers who had come to Elaine to effect the arrest of the men who had killed the man in the automobile the night before. There was testimony to the effect that when Hicks said he would shoot a member of his party told him not to do so, but no one made any attempt to restrain him. After this shooting the party dispersed, and during the excitement of the next few days two other white men were killed and a number of negroes.

It is now insisted that because of the incidents developed at the trial and those recited in the motions for new trials, and the excitement and feeling growing out of them, that no fair trial was had, or could have been had, and that the trial did not, therefore, constitute due process of law.

It is admitted, however, that eminent counsel was appointed to defend appellants, and no attempt is made to show that a fair and impartial trial was not had, except as an inference from the facts stated above, the insistence being that a fair trial was impossible under the circumstances stated.

We are unable, however, to say that this must necessarily have been the case. The trials were had according to the law, the jury was correctly charged as to the law of the case, and the testimony is legally sufficient to support the verdicts returned. We cannot, therefore, in the face of this affirmative showing, assume that the trial was an empty ceremony, conducted for the purpose only of appearing to comply with the requirements of the law, when
85 they were not in fact being complied with.

As to the appellants Frank Moore, Ed Hicks, J. E. Knox, Ed Coleman, and Paul Hall, it is insisted that the testimony does not sufficiently connect them with the act of Frank Hicks in firing the fatal shot to make them criminally responsible for that act. The law of the subject was properly declared, and we think the testimony of the numerous witnesses who were examined and cross-examined at the trial supports the finding that those appellants were present

when Frank Hicks killed Clinton Lee, and that they aided, abetted and assisted him in doing so, and if this is true they are as guilty as Hicks himself. According to these witnesses those appellants were all armed, and before leaving the place from which they started the purpose of going to Elaine to fight the white men found there was announced, and we think this testimony warranted the jury in finding that Hicks' act in firing the fatal shot was done pursuant to a conspiracy previously formed, which contemplated violence, and the possible killing of white men.

In the case of appellant Frank Hicks it is insisted that the judgment must be reversed because of the defective verdict. The verdict as found in the bill of exceptions was originally written in typewriting as follows: "We, the jury, find the defendant, Frank Hicks, guilty as charged in the indictment." Over this verdict has been interlined, between the words "guilty" and "as", the following words: "of murder in the first degree," so that the verdict as interlined reads: "We, the jury, find the defendant, Frank Hicks, guilty of murder in the first degree as charged in the indictment." On the margin of the page of the transcript on which this verdict appears is the following certificate made and signed by the trial judge: "The interlineation made in this verdict was made before I signed the bill of exceptions, and correctly shows the verdict as it was returned by the jury. J. M. Jackson, Circuit Judge." The judgment of the court also sets out in full the verdict returned, and the verdict as it is there recorded conforms to the certificate of the trial judge set out above.

86

It is true that in the cases of Johnson v. State, 84 Ark. 95, and Hobbs v. State, 86 Ark. 360, and Bridger v. State, 122 Ark. 391, we ignored as unauthorized certain interlineations made with a lead pencil for the reason, there stated, that the interlineations were unexplained and unauthenticated and apparently made without authority. But it has not been decided that this court will necessarily ignore interlineations appearing in a bill of exceptions or a transcript. Upon the contrary, interlineations may be a proper part of the record, and will be so treated by us unless it appears such interlineations were not properly authorized. Here we have the certificate of the trial judge saying that the interlineation was made before he had approved or signed the bill of exceptions, and, in addition, we have in the judgment proper a record of the verdict which shows it to be in proper form.

We have given these cases the careful consideration which their importance required, but our consideration is necessarily limited to those matters which are properly brought before us for review, and as no error has been made to appear in either case the judgments must be affirmed. It is so ordered.

87

88 November Term, 1919.

(Caption Omitted.)

April 19, 1920.

The appellants having filed a petition for rehearing within the time allowed by law, and duly served the same, it is now submitted and by the Court taken under advisement.

89 In the Supreme Court of Arkansas.

No. 2416.

FRANK MOORE, ED HICKS, J. E. KNOX, ED COLEMAN, and PAUL HALL, Appellants,

vs.

THE STATE OF ARKANSAS, Appellee.

Petition for Rehearing.

Appellants respectfully pray the Court to grant them a rehearing herein, and says:

1. That the Court is in error in its conclusion that their claim that the selection and organization of the grand jury, which returned the indictment against them and the petit jury that convicted them, composed wholly of white men, was a discrimination on account of their color,—assigned as a ground of the motion for a new trial, comes too late to be considered.

Under the rules of practice in this state, as previously announced by this Court, they could have raised the question as to the grand jury at no earlier stage of the proceeding, having been denied all opportunity to be present or make objection to such grand jury or any of its members, at the time of its organization.

2. The Court is in error in its conclusion that the fact that the "Farmers Progressive Household Union of America," was, according to the affidavits filed in support of the motion for a new trial, a fraternal and social organization, organized for the lawful
90 purpose of promoting the financial interests of its members, who were admonished, on their initiation, that attempts had been made to break up the lodge by white people, and to expect and prepare for trouble with the white people.

All this occurred in the evidence of witnesses for the State, members of the organization,—not one word of it or about it either in the motion for a new trial or in any affidavit in support of it.

3. The Court is in error in concluding and holding that appellents' insistence "that because of the incidents developed at the trial and those recited in the motion for a new trial, and the excitement and feeling growing out of them, no fair trial was had, or could

have been had, and that the trial did not, therefore, constitute due process of law," was not necessarily the case.

If the facts were as recited—undisputed facts—it is manifest that appellants were not accorded due process of law, and that a fair and impartial trial was not had,—was, under the circumstances, impossible.

4. The Court is in error in its conclusion that the trial was had according to law, the testimony legally sufficient to support the verdict, and that it must necessarily appear that due process of law was denied, and "that the trial was an empty ceremony, conducted for the purpose only of appearing to comply with the requirements of the law," to entitle appellants to a new trial.

91 Where the circumstances brought out on motion for a new trial or elsewhere bring the fairness and impartiality into anything like serious question, the judgment of conviction should be reversed. In the language of the appellate court in Rutherford v. U. S. 258 Fed., page 863, "It is not enough to justify a conviction that the defendant is guilty. He has a right to be tried in accordance with the rules of law. The defendants in this case did not have the temperate and impartial trial to which they were entitled, and for that reason the judgment is reversed."

The Court is in error in its apparent conclusion that the matters set up in the motion for a new trial are not properly brought before it for review, and that the judgment must, therefore, be affirmed.

If it be conceded that the matters relating to the grand and the petfit juries were raised too late, still the other matters set up in the motion which are undisputed, are not too late, if true, demand a reversal, and should be considered. Moreover, while counsel appointed to represent appellants, may, with reference to learning and capacity, be justly considered eminent, they were members of the local bar, dominated by the unfriendly and violent spirit that dominated the whole proceeding, and scrutinizing search of the record will fail to show any real effort on their part to afford appellants any real protection. Has it ever before occurred that a defendant charged with so grave a crime has been denied all opportunity to get witnesses, to prepare for defense, tried, so to speak, in the midst of a populace excited and enraged against him, by a jury whose members were of a different race and color from his own, and one of whose members he is charged of having murdered could find no relief in the appellate court? Such a case will thus go into judicial history, if it must retain its present status.

Appellants therefore pray a rehearing be granted them herein, and that the judgment against them be reversed.

SCIPIO A. JONES,
MURPHY & McHANEY,
Attorneys for Appellants.

I, G. W. Murphy, certify that I am one of the Attorneys of appellants; that I have carefully examined the foregoing petition for

rehearing, that the same is not filed or presented for delay, and that I believe it to be meritorious and well based.

G. W. MURPHY,
Attorney for Appellants.

Filed April 14, 1920. W. P. Sadler, Clerk.

93 November Term, 1919.

(Caption Omitted.)

April 26, 1920.

Being fully advised, the petition for rehearing filed herein, is by the Court overruled.

94 November Term, 1919.

(Caption Omitted.)

April 26, 1920.

Come the appellants by their attorneys and file a motion praying that an order be granted staying the issuance of a mandate in this cause, pending appeal to the Supreme Court of the United States; and said motion is by the Court taken under advisement.

November Term, 1919.

(Caption Omitted.)

May 3, 1920.

Being fully advised, the motion of the appellants for an order staying the issuance of a mandate in this cause, is by the court overruled.

95 STATE OF ARKANSAS,
In the Supreme Court, ss:

I, W. P. Sadler, clerk of said court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of Frank Moore, Ed Hicks, J. E. Knox, Ed Coleman, and Paul Hall, Appellants, vs. The State of Arkansas, Appellee, and also of the opinion of the court rendered therein, as the same now appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Little Rock, Arkansas, this May —, 1920.

[Seal of the Supreme Court of Arkansas.]

W. P. SADLER,
Clerk Supreme Court of Arkansas.

Endorsed: Filed Sept. 21, 1921. Sid. B. Redding, Clerk.

EXHIBIT "E."

(Copy.)

Hon. Charles H. Brough,
Governor of Arkansas.

November 14th, 1920.

DEAR GOVERNOR:

We, the undersigned members of the Committee of Seven, appointed by you in the Elaine-Hoop Spur Insurrection in this County, earnestly urge you to let the law take its course untrammelled by Executive Clemency.

With all the provocation our people refrained from mob violence. The reason they did this was that this Committee gave our citizens their solemn promise that the law would be carried out. This Community can be made a model one so far as resorting to mob violence is concerned, but should the Governor commute any sentence of these Elaine rioters, this would be difficult, if not impossible.

We respectfully urge you to support law and order as we supported it. There were 150 Negroes legally guilty of murder in the first degree—actively present and assisting in the wilful and deliberate murder of white citizens—and this Committee assisted in seeing that only leaders were brought to trial. Leniency has been already shown. We think the law itself is on trial.

All of our citizens are of the opinion that the law should take its course.

(Signed) S. STRAUSS,
Chairman.
E. M. ALLEN.
T. W. KEESEE.
H. D. MOORE.
H. C. HORNER.

Endorsed: Filed Sept. 21, 1921. Sid B. Redding, Clerk.

EXHIBIT "F."

HICKS
vs.
STATE.

Opinion. Delivered March 29, 1920.

Appeal from Phillips Circuit Court. J. M. Jackson, Judge. Affirmed.

Scipio A. Jones and Murphy, McHaney for appellants.

1. Appellants were discriminated against on account of their color and no colored men sat upon the jury or was summoned to serve.

2. The verdict is plainly against the evidence. 107 Atl. 554.

3. The verdict is defective.

Defendants are not guaranteed under our Constitution, nor that of the United States, a trial by members of *his* own race, but only a fair and impartial — by a jury who are unbaised and unprejudici*al* without regard to color or race. 100 U. S. 322. The panel should have been challenged, and as he did not, he can not complain that there were no Negroes on the jury. 21 Ark. 212, 5 Id. 444; 29 Id. 17; 101 Id. 462; 94 Id. 465.

John D. Arbuckle, Attorney General, and J. B. Webster, Assistant, for Appellee, Robert C. Knox, of Counsel.

SMITH, *J.*:

Appellant Frank Hicks was indicted for murder in the first degree, alleged to have been committed by shooting one Clinton Lee, and at his trial was convicted of that crime. Appellants, Frank Moore, Ed Hicks, J. E. Knox, Ed Coleman and Paul Hall, were indicted for the same crime, and were tried together, and were all convicted of murder in the first degree. Appeals have been perfected from both judgments, and as the questions raised are substantially the same in each case we dispose of both with one opinion.

It is insisted as ground for reversal in each case that appellants who are all men of color, were discriminated against on that account, and that no colored men sat, or was summoned to serve, upon either the grand jury which returned the indictments or upon the petit juries which tried the cases, and that no colored men had served on any jury in Phillips County—where the trials occurred—for many years. This assignment of error is answered by saying that the question was first raised in the motion for a new trial, and it, therefore, comes too late to be considered. Tillman vs. State, 121 Ark. 332; Eastling vs. State, 69 Ark. 89.

It is also insisted on behalf of all the appellants that the verdicts are contrary to the law and the evidence, and are not supported by sufficient evidence, and that appellants have been convicted without due process of law. The facts upon which these contentions are chiefly made were not developed at the trial, but are brought into the record by affidavits filed in support of the motions for new trials.

Discussing these questions together, it may be said that appellants, together with many other men of their own race, were members of an organization known as the Farmers' Progressive Household Union of America. According to the affidavits filed in support of the motions for new trials, this was a fraternal and social organization, organized for the lawful purpose of promoting the financial interest of its members; it met in secret, excluding all persons except those who had been properly initiated, but, according to testimony on behalf of the State, members were told upon their initiation to expect and prepare for trouble with the white people. Mem-

ers went armed to the meetings, and armed meetings were held to prevent persons not members, fortified with the pass-word, from approaching the building. While one of these meetings was in progress, an automobile containing two white men and one Negro passed along the public road near this building, and stopped some forty or fifty yards from it, whereupon the pickets fired into the car and killed one of the white men in it.

At the trial from which these appeals come the following facts were developed. Early in the morning after the killing of the men in the car a number of the lodge members, probably as many as fifty, including appellants, assembled at or about the houses of Appellants Moore, Hall and Coleman, about a mile from Elaine and Hoop Spur, where the shooting of the night before occurred. All, or practically all, of the members were armed, and appellants, Moore made the statement that they would kill the white people who came there. All of this is admitted, but it is explained that the members had gathered only to resist an attack being made on themselves, and that they intended to kill the white men whom they expected to come only to prevent the white men killing them.

Sometime between 11 A. M. and 1 P. M. firing near Elaine or Hoop Spur was heard, whereupon appellants, with a number of others, fell in line, and proceeded to march toward Elaine, Moore having said as they fell into line, that some of their members were being attacked, and that they would go and help them fight. As they marched along by twos and fours, they crossed a railroad, and, as they did so, they observed, at the home of one McCoy, a white man about a quarter of a mile away, a number of white men standing in the road at McCoy's house or seated in the car which had stopped there on the roadside. When they observed the white men, appellant Frank Hicks said he would shoot at them. He knelt, took aim and fired two shots, one of which struck Clinton Lee, who died just after he was carried into McCoy's house. These shots were fired from a high-powered rifle, and at such distance away that some of the white men standing near Lee stated that they did not hear the report of the gun which killed him. This party of white men consisted of officers who had come to Elaine to effect the arrest of the men who had killed the man in the automobile the night before. There was testimony to the effect that when Hicks said he would shoot a member of his party told him not to do so, but no one made any attempt to restrain him. After this shooting the party dispersed, and during the excitement of the next few days other white men were killed and a number of Negroes.

It is now insisted that because of the incidents developed at the trial and those recited in the motion for new trials, and the excitement and feeling growing out of them, no fair trial was had, or could have been had, and that the trial did not, therefore constitute due process of law.

It is admitted, however that eminent counsel was appointed to defend appellants, and no attempt is made to show that a fair and impartial trial was not had, except as an inference from the facts

stated above, the insistence being that a fair trial was impossible under the circumstances stated.

We are unable, however, to say that this must necessarily have been the case. The trials were had according to law, the jury was correctly charged as to the law of the case, and the testimony is legally sufficient to support the verdicts returned. We cannot, therefore, in the face of this affirmative showing, assume that the trial was an empty ceremony, conducted for the purpose only of appearing to comply with the requirements of the law, when they were not in fact being complied with.

As to the appellants, Frank Moore, Ed Hicks, J. E. Knox, Ed Coleman and Paul Hall, it is insisted that the testimony does not sufficiently connect them with the act of Frank Hicks in firing the fatal shot to make them criminally responsible for that act. The law of the subject was properly declared and we think the testimony of the numerous witnesses who were examined and cross-examined at the trial supports the finding that those appellants were present when Frank Hicks killed Clinton Lee, and that they aided, abetted and assisted him in doing so, and if this is true they are as guilty as Hicks himself. According to these witnesses, those appellants were all armed, and before leaving the place from which they started the purpose of going to Elaine to fight the white men found there was announced, and we think this testimony warranted the jury in finding that Hicks' act in firing the fatal shot was done pursuant to a conspiracy previously formed, which contemplated violence, and the possible killing of white men.

In the case of appellant Frank Hicks, it is insisted that the judgment must be reversed because of the defective verdict. The verdict as found in the bill of exceptions was originally written in typewriting as follows: "We, the jury, find the defendant, Frank Hicks, guilty as charged in the indictment." Over this verdict has been interlined, between the words "guilty" and "as" the following words: "of murder in the first degree," so that the verdict as interlined reads: "We the jury find the defendant, Frank Hicks, guilty of murder in the first degree as charged in the indictment," on the margin of the page of the transcript on which this verdict appears is the following certificate made and signed by the trial judge: "The interlineations made in this verdict was made before I signed the bill of exceptions, and correctly shows the verdict as it was returned by the jury, J. M. Jackson, Circuit Judge." The judgment of the court also sets out in full the verdict returned, and the verdict as it is there recorded conforms to the certificate of the trial judge set out above.

It is true that in the cases of Johnson v. State, 84 Ark. 95 and Hobbs v. State 86 Ark. 360, and Bridger vs. State, 122 Ark. 391, we ignored as unauthorized certain interlineations made with a lead pencil for the reason there stated, that the interlineations were explained unauthenticated and apparently made without authority. But it has not been decided that this court will necessarily ignore interlineations appearing in a bill of exceptions or a transcript. Upon the contrary, interlineations may be a proper

part of the record and will be so treated by us unless it appears such interlineations were not properly authorized. Here we have the certificate of the trial judge saying that the interlineations was made before he had approved or signed the bill of exceptions, and, in addition, we have in the judgment proper a record of the verdict which shows it to be in proper form.

We have given these cases the careful consideration which their importance required, but our consideration is necessarily limited to those matters which are properly brought before us for review, and as no error has been made to appear in eather case the judgments must be affirmed. It is so ordered.

Endorsed: Filed Sept. 21, 1921. Sid. B. Redding, Clerk.

EXHIBIT "G."

State of Arkansas,

Executive Department.

Proclamation.

To all to whom these presents shall come, Greetings:

Know ye, that whereas, J. E. Knox, Ed Coleman, Paul Hall, Frank Hicks, Ed Hicks and Frank Moore, were convicted at the November, 1919, Term of the Phillips County Circuit Court of the crime of murder in the first degree, and sentenced by said court to death by electrocution, and their cases being appealed to the Supreme Court of Arkansas, the pendency of which appeal suspended execution beyond the date fixed by the said trial court, and said judgments of conviction being by said court affirmed, it now becomes my duty as Governor of the State of Arkansas, under Section 3262 of Crawford and Moses' Digest of the statutes of Arkansas, to fix the date of their execution, and each of them;

Now, therefore, I, Thomas C. McRae, Governor of the State of Arkansas, acting in my official capacity, do hereby and herein fix the date for the execution of the said J. E. Knox, Ed Coleman, Paul Hall, Frank Hicks, Ed Hicks and Frank Moore, and each of them, to be on Friday, the 10th day of June, 1921.

In testimony whereof, I have hereunto set my hand and caused to be affixed the Great Seal of State, in the Executive Chamber, at Little Rock, Arkansas, on this the twenty-ninth day of April, 1921.

[SEAL.] THOMAS C. McRAE,
Governor.

By the Governor:
IRA C. HOPPER,
Secretary of State.

State of Arkansas,

Executive Department.

Proclamation.

To all to whom these presents shall come, Greeting:

Know ye, that whereas, J. E. Knox, Ed Coleman, Paul Hall, Frank Hicks, Ed Hicks and Frank Moore were convicted at the 1919 term of the Phillips County Circuit Court for the crime of murder in the first degree, and sentenced by said court to death by electrocution, and their cases being appealed to the Supreme Court of Arkansas the pendency of which appeal suspended execution beyond the date fixed by said trial court, and said judgments of conviction being by said court affirmed it became my duty as Governor of the State of Arkansas, under Section 3262 of Crawford & Moses' Digest of the statutes of Arkansas to fix the date of their execution, which I did on the 29th day of April, 1921. Before the date set for execution the Chancery Court of Pulaski County assumed jurisdiction in these cases and issued a restraining order prohibiting said execution. The State Supreme Court was appealed to by the state for a writ of prohibition against the Chancery Court to prevent said court from assuming jurisdiction. The Supreme Court of Arkansas issued said writ of prohibition against the Chancery Court, from which judgment there has been no further appeal, and it therefore now becomes my duty as Governor of the State of Arkansas, under Section 3262 of Crawford & Moses' Digest of the statutes of Arkansas, to fix the date of their execution, and each of them.

Now Therefore, I, Thomas C. McRae, Governor of the State of Arkansas, acting in my official capacity, do hereby and herein affix the date for the execution of the said J. E. Know, Ed Coleman, Paul Hall, Frank Hicks, Ed Hicks and Frank Moore, and each of them to be on Friday, the twenty-third day of September, 1921.

In Testimony Whereof, I have hereunto set my hand and caused to be affixed the Great Seal of State, in the Executive Chamber, at Little Rock, Arkansas, on this the twelfth day of August, 1921.

[SEAL.] THOMAS C. McRAE,
Governor.

By the Governor:
IRA C. HOPPER,
Secretary of State.

Endorsed: Filed September 21, 1921. Sid. B. Redding, Clerk.

EXHIBIT "H."

Resolution.

It has been brought to the attention of the Richard L. Kitchen Post #31, American Legion, Helena, Arkansas, that the Governor is contemplating commuting the sentence of four of the negroes,

who are now under death sentences for their participation in the Elaine Riot, to lesser sentences, and we, the members of this post feel that any action toward this end by the Governor, would do more harm in the community and breed lawlessness, as well as disregard for constituted authority, as at the time of this race riot the members of this Post were called upon to go to Hoop Spur and Elaine to protect life and property, and in compliance with this request, there were two American Legion members killed and one seriously injured, besides the other non-members who also perished, and when the guilty negroes were apprehended, a solemn promise was given by the leading citizens of the community, that if these guilty parties were not lynched, and let the law take its course, that justice would be done and the majesty of the law upheld.

The twelve negroes now under sentence of death, but whose sentences are suspended — account of court procedure, and six of these negro cases have — taken to the Supreme Court of the United States, which court declined to review. The other six cases, whose original trials were reversed and new trials given them, were convicted, and their cases were appealed to the Supreme Court of the State and attorneys of their own selection were permitted to handle their cases.

Now therefore be it resolved by this Post assembled on this the 19th dau of October, 1920, that we most earnestly protest against the commutation of anu of the sentences of these twelve negroes convicted of murder in the Elaine riot of October 1919, their having received a fair trial and — proven guilty, and the leniency of the court was shown in the balance of the cases tried, these being the ring leaders and guilty murderers, and that law and order will be vindicated and a solemn promise kept.

Be it further resolved that a com-ittee of four be appointed by the Post Commaander. This Committee is hereby empowered to represent this Post at a conference, or several conferences, with the Governor of Arkansas and to take such steps as they may deem necessary to carry out the wishes of this resolution and leaving nothing undone to have these sentences carried out. This committee to report in full to the next meeting of this post.

Passed unanimously 8:30 P. M. October 19, 1920, basement of the Episcopal Church, Helena, Arkansas.

R. H. MOTT,
Post Commander.

EDWIN BURKS,
Adjutant.

Committee appointed:

Mr. Herbert Thompson, Chairman.
Mr. T. H. Faulkner, Jr.
Mr. J. B. Lambert.
Mr. L. J. Wilkes, Jr.

Endorsed: Filed Sept. 21, 1921. Sid. B. Redding, Clerk.

EXHIBIT "I."

(Copy.)

November 10, 1920.

At a regular meeting of the Helena Rotary Club, held this date and attended by seventy five members, representing seventy five of the leading industrial and commercial enterprises of this City, there was read the resolution which was adopted by the Richard L. Kitchens Post, No. 41, American Legion, Helena, Arkansas, on the 19th day of October, 1920, protesting to the Governor against the commutation of sentences of any of the negroes who have been heretofore convicted of participation in the Elaine Insurrection; and by unanimous vote of the Helena Rotary Club, it was,

Resolved: That the Helena Rotary Club does hereby give its unqualified approval and support of the action and resolution of the Richard L. Kitchens Post No. 41, of the American Legion, and pledges its full co-operation and assistance to the accomplishment of the purposes of said resolution, and it is also

Resolved That a copy of this resolution, officially signed by the President and Secretary of the Helena Rotary Club, be presented to the Commander of the Richard L. Kitchens Post, No. 41, American Legion of Helena, Arkansas.

(Signed) HELENA ROTARY CLUB OF HELENA, ARKANSAS,
By S. STRAUB,
President.
OZERO C. BREWER,
Secretary.

Endorsed: Filed Sept. 21, 1921. Sid. B. Redding, Clerk.

EXHIBIT "J."

(Copy.)

At a regular meeting of the Lions Club of Helena, held this date and attended by sixty members, representing sixty of the leading industrial and commercial enterprises of this city, there was read the resolution which was adopted by the Richard L. Kitchens Post, No. 41, American Legion, Helena, Arkansas on the 19th day of October, 1920, protesting to the Governor against the commutation of sentences of any of the negroes who have been heretofore convicted of participation in the Elaine insurrection; and by unanimous vote of the Lions Club of Helena, it was

Resolved: That the Lions Club of Helena does hereby give its unqualified approval and support of the action and resolution of the Richard L. Kitchens Post, No. 41, of the American Legion, and pledges its full co-operation and assistance to the accomplishment of the purpose of said resolution. And it is also

Resolved: That a copy of this resolution, officially signed by the President and Secretary of the Lions Club of Helena, be presented to the Commander of the Richard L. Kitchens Post, No. 41, American Legion of Helena, Arkansas.

(Signed) LIONS CLUB OF HELENA, ARKANSAS,
By JOS. C. MAYERS,
President.
SKIPWITH ADAMS,
Secretary.

Endorsed: Filed Sept. 21, 1921. Sid. B. Redding, Clerk.

EXHIBIT "K."

In the Supreme Court of Arkansas, June 20, 1921.

No. 52.

STATE ex Rel.

v.

MARTINEAU, Chancellor.

Opinion

McCULLOCH, *C. J.*:

Frank Hicks, Frank Moore, Ed Hicks, J. E. Knox, Ed Coleman and Paul Hall, who had previously been indicted and convicted of the crime of murder, and who were being confined in the State Penitentiary awaiting execution of the death sentences, filed a petition for habeas corpus in the chancery court of Pulaski County, praying that they be discharged from custody and from said judgments of conviction. This petition was filed and presented to the Chancellor on June 8, 1921, who immediately ordered the issuance of a writ of habeas corpus directed to the keeper of the penitentiary, and the Chancellor also ordered the issuance of a writ of injunction restraining the said keeper from executing the death sentences upon said petitioners in accordance with said judgments of conviction and the proclamation of the Governor fixing the date of executions. The writs were issued and made returnable for hearing before the chancery court at 2 o'clock P. M. on June 10, 1921, and E. H. Dempsey, keeper of the penitentiary, was made respondent in the proceeding and copies of the proceedings and process were served on him and on the Attorney General, who appeared before the Chancellor on behalf of the State and the keeper of the penitentiary and made objections challenging the jurisdiction of the chancery court. A petition has been filed here praying for a writ of prohibition to restrain the chancery court from proceeding in the matter, alleging that it is not within the jurisdiction of that court. The chancery

court postponed further hearing on the matter until a decision of this court could be rendered as to the jurisdiction of that court. The petitioners in the proceeding below, as well as the Chancellor, have responded to the present petition and the former seek to uphold the jurisdiction of the chancery court. Relators presented the present petition to the Justices of the Supreme Court on June 9, 1921, for a temporary writ of prohibition pending the presentation of the matter to the court in session, but on objection being made by respondents to the hearing at that time it was postponed to the first session of the court on Monday, June 13, 1921, and the cause was set down for hearing on that day.

On the outset of the hearing by this court respondents were opposed to proceeding at this time on the ground that the notice was not given for the length of time required by statute. There is a statute regulating the practice on applications for mandamus and prohibition, which provides that ten days' notice of an application shall be given. Crawford & Moses Digest, 6251 and 7023. This statute manifestly applies only to proceedings of this nature in courts of original jurisdiction. It defines a writ of mandamus, treated in the chapter, "as an order of a court of competent and original jurisdiction," and defines a writ of prohibition as "an order from a circuit court to an inferior court of limited jurisdiction prohibiting it from proceeding in a matter out of its jurisdiction." Crawford & Moses Digest, Secs. 7021-22. This does not apply to proceedings in the Supreme Court where jurisdiction is derived from the Constitution, but there is no statute regulating the practice. Prairie C. C. M. Co. v. Kittrell, 107 Ark. 361. This leaves the matter of notice as one to be fixed by the rules of this court. This seems to have been the thought in the mind of the court in deciding the case of Tucker ex parte, 25 Ark. 567, which arose shortly after the adoption of the civil code containing the provision referred to in regard to notice. In the opinion it was said following, the common law practice, that a writ of prohibition should not be "issued unless an opportunity be offered those sought to be prohibited of showing cause against it," but no reference was made to the statute requiring notice. There is no established rule of this court on the subject and it is a question to be determined in each instance whether reasonable notice has been given. In the present case we concluded that the notice was, under the circumstances, reasonable and the request for further postponement was denied. In fact, there was no contention that the notice was unreasonable if we concluded that the statute referred to did not apply.

Again it is urged that the remedy should not be awarded under the writ of prohibition for the reason that the proper objection had not been made to and overruled by the Chancellor to the exercise of jurisdiction. The rule has often been recognized in decisions of this court that prohibition is not available until objection to the wrongful attempt to exercise jurisdiction has been raised in the inferior tribunal and overruled; but exceptions to that rule have been found. Reese v. Steel, 73 Ark. 66; Monette Road Imp. Dist. vs. Dudley, 144 Ark. 169.

The state of the matter as presented here is this: The chancery court has already exercised jurisdiction by issuing an injunction staying execution of the judgments in the criminal cases and has set the cause for final hearing. Relators made objection to the exercise of jurisdiction, but the chancery court declined to decide either the question of jurisdiction or the merits of the case until after this court determined the question of jurisdiction. The Chancery court on June 10, postponed the hearing indefinitely until this court decides the present case. The effect of the court's attitude is therefore to retain jurisdiction and to further exercise it in due time unless prohibited by this court. The case, therefore, falls within the exceptions stated in Monette Road Imp. Dist. v. Dudley, supra. Relators are now under restraint until the writ of injunction issued by the chancery court in the attempt to exercise jurisdiction which it is alleged that court did not rightfully possess, and the failure of the court on the request of the relators to relinquish jurisdiction is tantamount to overruling the objection.

This brings us to the consideration of the main question in the case, whether or not, upon the allegations of the petition filed below, the chancery court possessed jurisdiction, either by injunction or under the writ of habeas corpus, to review the proceedings in which the accused respondents were convicted of the crime of murder or to interfere with the judgments of conviction. The facts are stated in detail and at great length in the petition filed, and include the record of the proceedings in which the accused respondents were indicted, tried and convicted, the record of the appeal to this court, the judgment of affirmance and the opinion of this court, and also the record of the application to the Supreme Court of the United States for a writ of certiorari to review the proceedings.

The accused respondents were indicted by the grand jury of Phillips County of the crime of murder in the first degree, alleged to have been committed by shooting one Clinton Lee. It is charged in the indictment and was proved at the trial that the killing of Lee occurred on October 29, 1919, and on the 3rd day of November, 1919, the trials occurred. Frank Hicks was tried separately and the other five were tried together, and each trial resulted in a conviction of murder in the first degree. When the accused were brought into court and arraigned they had no attorney to represent them and the court appointed counsel, certain members of the Phillips County bar who represented the accused throughout the trials. There were no exceptions saved during the progress of the trials, but the records show that counsel for the accused cross-examined all of the State's witnesses at length. Before the final adjournment of the circuit court for the term and within the time allowed by law the accused or their friends employed to represent them the counsel who now appear in their behalf in the present proceedings, and they filed a motion for a new trial, supported by affidavits, which was heard by the court and overruled on December 18, 1919. The motion set forth, as grounds therefor, that the verdict was contrary to the law and the evidence and that the court erred in rendering judgment upon the verdict. The motion also set forth at considerable length and in detail the

circumstances surrounding the accused at the time of the killing of Clinton Lee and from then up to and throughout the trials of the causes, stating among other things that "at the time of the returning of said indictment and trial said excitement and bitterness of feeling among the whites of said county against the negroes, especially against the defendants, was unabated and still at the height of its tensity." It alleged, in substance, that the trials of the accused occurred during a period of great excitement; that the accused were given no opportunity to consult with friends or to employ counsel and while they were confined awaiting a trial a mob composed of several hundred armed white men surrounded the jail and court-house and that the excitement and feeling against the accused among the white people of the county was such that it was impossible to obtain an impartial jury. The substance of the ground thus pleaded was that they had not been given fair trial on account of the alleged domination of a mob over the court and jury. Upon overruling the motion for new trial the circuit court allowed the accused sixty days within which to prepare and file a bill of exceptions which was filed within the time allowed and an appeal was duly prosecuted to this court and after arguments the case was decided by this court affirming the judgment of conviction. All of the assignments of error in the motion for new trial were reviewed in the opinion of *the* this court and decided against the contention of the accused, Hicks v. State, 143 Ark. 58. Thereafter a petition was presented to the Supreme Court of the United States for a writ of certiorari, which was by that court refused. Since that time the accused respondents have remained in the custody of the keeper of the penitentiary awaiting the action of the Governor in fixing the date of execution, and the proclamation of the Governor fixing the date of the execution on June 10, 1921, has been suspended by the injunction of the chancery court.

The petition filed below contains a repetition of the allegations contained in the motion for new trial with reference to the excitement prevailing at and before the trial in the circuit court and the alleged domination of mob violence. It also contains a charge, which was also stated in the motion for new trial, that the accused, being negroes, were denied the right and privilege guaranteed by the Constitution of the United States by the exclusion of men of their race from the grand jury and from the trial jury in Phillips County. The petition recites facts in regard to publications in newspapers and resolutions passed by civic and fraternal organizations prior to the trial and subsequent thereto alleged to be calculated to arouse the people of Phillips County to a high pitch of excitement. It also gives a history of the events which are said to have led up to the killing of Clinton Lee and declares the innocence of the accused of the crime charged in the indictment. It also alleges that the witnesses introduced by the state in the prosecution of the accused were tortured into giving false testimony, which said witnesses had retracted since the trial. It contains *and* allegation that prior to the indictment of the accused there had been an investigation by a committee of white citizens in Phillips County for the purpose of ascertaining who

were the guilty parties in the homicide which had occurred and it is stated in the petition that "The entire trial, verdict and judgment against them was but an empty ceremony; that their real trial and condemnation had already taken place before said 'Commit-ee of Seven,' that said committee, in advance of the sitting of the court, had set in judgment upon their and all other cases and assumed and exercised the jurisdiction of the court by determining the guilt or innocence of those in jail, had acquired the evidence in the manner herein set out, and decided which of the defendants should be electrocuted and which sent to prison and the terms to be given them, and which to be discharged; that when court convened, the program laid out by said committee was carried through and the verdict against petitioners was pronuonced not as the independent verdict of an unbiased jury, but as part of the pre-arranged scheme and judgment of said committee; that in doing this the court did not exercise the jurisdiction given it by law and wholly lost its jurisdiction by substituting for its judgment the judgment of condemnation of said committee."

The doctrine has been announced by this court that courts of equity in this State are not clothed with jurisdiction to review proceedings in criminal cases or to interfere with such proceedings either by injunction or under the writ of habeas corpus. State ex rel. Williams, 97 Ark. 243, Ferguson v. Martineau, Chancellor, 115 Ark. 317. In State ex rel. v. Williams, there was an instance where the chancellor had, after indictment of the accused in the circuit court, issued a writ of habeas corpus for the purpose of allowing bail and we held that the circuit court acquired exclusive jurisdiction of the cause upon the return of the indictment and that the chancery court had no jurisdiction to interfere even to the extent of allowing bail. In disposing of the matter, we said: "The Chancellor has nothing to do with the administration of the criminal laws nor right to interfere with them neither has he appellate jurisdiction over criminal trials nor appellate or supervisory jurisdiction over the actions of chancellors or circuit judges granting or refusing bail."

The case of Ferguson vs. Martineau, Chancellor, supra, was one where the chancellor issued an injunction to restrain the keeper of the State Penitentiary from executing a death sentence, the writ being issued to suspend proceedings and stay the execution until the sanity of the accused could be inquired into in the probate court. In disposing of the case, in which we held that the chancery court was proceeding beyond its jurisdiction we said: "Courts of equity have to do with civil and property rights, and they have no jurisdiction to interfere by injunction with criminal proceedings. They can not stay processes of courts having the exclusive jurisdiction of criminal matters, where no civil or property rights are involved."

These two decisions seem to be conclusive of the controversy now before us and to settle the question that the chancery court was without jurisdiction. But it is insisted that while such is the effect of our decisions in establishing the jurisdiction of courts that they do not reach to the particular question now presented, which is that

under the "due process of law" provision of the Constitution of the United States any court having authority to issue a writ of habeas corpus possesses jurisdiction to inquire into and review the proceedings in criminal cases for the purpose of determining whether or not the judgment was the result of "due process of law within the meaning of the Federal Constitution." In other words, the contention is that the provision of the Constitution with reference to due process of law and the Federal statutes prescribing the remedies whereby the constitutional guaranty may be enforced must be read into the State laws so that the prescribed remedies may be afforded in the State courts.

Counsel for respondents rely on the case of Frank v. Mangum, 237 U. S. 309, as sustaining this contention but an analysis of that decision and a consideration of the language employed by the learned justice who wrote it shows very clearly that such is not the effect of that decision. The court distinctly recognized the well established rule at common-law and under the British statutes, that on habeas corpus a court was confined in its inquiry to the face of the process of the judgment under which the prisoner was held in custody. The case of Ex parte Watkins, 3 Peters 193, was cited where Chief Justice Marshall, in delivering the opinion of the court, followed the common law rule stated above and decided that a court could not, under habeas corpus, look beyond the face of the judgment of a court of competent jurisdiction to determine whether or not a prisoner was being unlawfully held. This is in accordance with repeated decisions of our own court holding that if a petitioner for habeas corpus "is in custody under process regular on its face nothing will be inquired into save the jurisdiction of the court whence the process came." State ex rel. v. Neel, 48 Ark. 283; Barnett ex parte, 51 Ark. 215; Ex parte Perdue, 58 Ark. 285; Ex Parte Foote, 70 Ark. 12; Ex parte Byles, 93 Ark. 612; Ex parte Williams, 99 Ark. 475.

But the Supreme Court of the United States in the Frank case, supra, held that Congress had, by the Act of February 5, 1867 (Revised Statutes, Section 753 et seq.) conferred upon the Federal Courts express authority to inquire beyond the face of the process or judgment under which a prisoner is being held and "extended the writ of habeas corpus to all cases of persons restrained of their liberty in violation of Constitution or law or treaty of the United States." Further speaking on this subject, the court said: "The effect" (Acts 1867) "is to substitute for the bare legal review that seems to have been the limit of judicial authority under the common law practice, and under the act of 31 Car. II, c. 2, a more searching investigation, in which the applicant is put upon his oath to set forth the truth of the matter respecting the causes of his detention, and the court, upon determining the actual facts, is to 'dispose of the party as law and justice require.'"

The statute referred to does not apply to any courts except to the Supreme Court and circuit and district courts of the United States, and it defines the practice in those courts and the powers of the courts under the remedy afforded by the writ of habeas corpus. The

statute does not purport to apply to the courts of the States and Congress had no authority, had it attempted to do so, to prescribe the power of the State courts and the practice to be followed in matters within their jurisdiction. The court in the Frank case in effect held that the statute had no application to the State courts, for it said this: "But repeated decisions of this court have put it beyond the range of further debate that 'due process' clause of the Fourteenth Amendment has not the effect of imposing upon the States any particular form or mode of procedure, so long as the essential rights of notice and a hearing, or opportunity to be heard, before a competent tribunal are not interfered with."

And again in speaking of the due process mandate in the Constitution, the court said: "The prohibition is addressed to the State, if it be violated, it makes no difference in a court of the United States by what agency of the State this is done; so, if a violation be threatened by one agency of the State but prevented by another agency of higher authority, there is no violation by the State. It is for the State to determine what courts or other tribunals shall be established for the trial of offenses against its criminal laws, and to define their several jurisdictions and authority as between themselves. And the question whether a state is depriving a prisoner of his liberty without due process of law, where the offense for which he is prosecuted is based upon a law that does not violence to the Federal Constitution cannot ordinarily be determined, with fairness to the State, until the conclusion of the course of justice in its courts."

And again the court said on this subject: "as to the 'due process of law' that is required by the Fourteenth Amendment, it is perfectly well settled that a criminal prosecution in the courts of a state, based upon a law not in itself repugnant to the Federal Constitution and conducted according to the settled course of judicial proceedings, as established by the law of the State, so long as it includes notice, and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure, is 'due process' in the constitutional sense."

What the result would be of an application to a Federal Court under the statutes referred to and upon the facts stated in the petition we need not inquire. A perusal of the opinion of the Supreme Court of the United States in the Frank case, supra, is, however, illuminative of the subject. The court, after reviewing all of the facts as narrated in the petition and referring to the various proceedings in the State courts, said: "The narrative has no proper place in a petition addressed to a court of the United States except as it may tend to throw light upon the question whether the State of Georgia, having regard to the entire course of the proceedings, in the appellate as well as in the trial court, is depriving the appellant of his liberty and intending to deprive him of his life without due process of law. Dealing with the narrative, then, in its essence, and in its relation to the context, it clearly appears to be only a reiteration of allegations that appellant had a right to submit, and did submit, first to the trial court and afterwards to the

Supreme Court of the State, as a ground for avoiding the consequences of the trial."

The court further said that "this familiar phrase 'due process of law' does not mean that the operations of the State government shall be conducted without error or fault in any particular case, nor that the Federal Courts may substitute their judgment for that of the State courts, or exercise any general review over their proceedings, but only that the fundamental rights of the prisoner shall not be taken from him arbitrarily or without the right to be heard according to the usual course of law in such case."

Further discussion would seem to be useless. It was not contended in the argument here that there is any other charge in the motion upon which relief could be granted, except the one to the effect that the trial court was dominated by a mob, which suspended the functions of the court and prevented a fair trial. There are no other facts in the petition which would warrant a review of the judgment of the circuit court of Phillips County. The allegations with regard to newly discovered evidence and the retraction by the State's witnesses, which is, in effect, an allegation of the discovery of new evidence, afford no grounds for a review of the judgments of conviction, for there is no provision in the laws of this State for the granting of a new trial after the lapse of the term on the ground of newly discovered evidence, Howard vs. State, 58 Ark. 229; Thomas v. State, 136 Ark. 290; Satterwhite v. State., MS. Op.

It follows that the chancery court is without jurisdiction to proceed and the writ of prohibition will, therefore, be granted and the writ of habeas corpus as well as the injunctive order issued by the court will be quashed.

Endorsed: Filed Sept. 21, 1921. Sid. B. Redding, Clerk.

Affidavit of T. K. Jones.

STATE OF TENNESSEE,
County of Shelby, ss:

T. M. Jones, being first duly sworn, deposed and said:

My name is T. K. Jones. My age is 42, and I reside at 250 Lucerne Place, Memphis, Tennessee. I know the petitioners Frank Hicks, Frank Moore, Ed Hicks, J. E. Know, Ed Coleman and Paul Hall, and have known them since about the 1st of October, 1919.

For about six years prior to July 15, 1921, I was special agent for the Missouri-Pacific Railroad. In the year 1919 I was special agent in charge of the Memphis Division from Noble, Arkansas, to McGehee, Arkansas, Memphis to Bald Knob, Memphis to Marianna, Helena to Clarendon and Brinkley, with headquarters at Wynne, Arkansas. On the night of September 30, 1919, I was in Helena, Arkansas. Mr. Dick Dazell came to me about 7 o'clock P. M. of that date, and asked me if special officers Smiddy and Atkins could go with Mr. Charles Pratt down to Elaine that night to arrest a man by the name of Clem, charged with some kind of a misdemeanor, and I

told him that they could go if they wanted to. Mr. Smiddy and Mr. Atkins were both in the employ of the Missouri-Pacific Railway, working under my direction. Mr. Smiddy did not go, but Mr. Atkins did go with Mr. Pratt, and I was present about 9 o'clock P. M. when they left in a Ford automobile in front of the court house on this trip. I heard them say before leaving that they had to go by Mr. E. J. Weyeth's house, and when they left, instead of going in the direction of Elaine, they left in the direction of Mr. Weyeth's house. I did not hear them say for what purpose they were going to Mr. Weyeth's house.

Later on I went to the Cleiborne Hotel and went to bed. Mr. Smiddy had a room across the hall from me in the same hotel.

About 2 o'clock in the night Mr. Dazell called me on the telephone and told me that the men who had left that night had gotton into some trouble down about Hoop Spur and that there was some shooting and that our men might be hurt. And he asked me if Mr. Smiddy and I could go with him and some others that were going down there to investigate the matter. I told him that we would. And I waked Mr. Smiddy and we dressed and went down with them, there being two automobile loads of us, four of us in Mr. Dazell's car and five in Mr. Aubrey's car.

We arrived at Hoop Spur church house about 3:30 or 4:00 o'clock in the morning. It was still dark. We found the dead body of Mr. Atkins about 30 feet north of the bridge across the slough which runs across the public road just north of the Hoop Spur church. As soon as we discovered the body of Mr. Atkins I jumped out of the automobile and went to it and found that he was dead. I paid no particular attention to what the other members of the party were doing, but was looking after Mr. Atkins. We found the Ford automobile close by. I went up to the church house and saw the disarranged condition of the benches and everything as described by Mr. Smiddy in his affidavit. There was a horse and wagon out north of the church hitched to the fence, and we found a saddle in the road out south of the bridge near the church. This bridge is proba-ly thirty five or forty yards north of the front of the church. After spending proba-ly thirty minutes at the church house we drove on to Elaine where Mr. Dazell phoned to Mr. Kitchens at Helena and reported what we had found. About sun-up we returned to the Hoop Spur church. I made no further examination of the church house, and I did not know whether it was shot into or not from my own observation; but a shed house standing to the north of the church with the roof slanting to the north appeared to have been shot into from the north. I was more concerned about the disposition of Mr. Atkins' body than I was about the condition of the church house.

Along in the afternoon of the same day while again at Elaine I heard some planters talking and from their conversation I understood that a number of white men had gone to the Hoop Spur church house the night before for the purpose of breaking up the meeting of the negroes there and that the white people had shot into the church and started the shooting. Just who these men were I do not

now recall. One of them said to the other that, "My negroes don't belong to that blankety blank union." The other said, "How in the hell do you know they don't?" He answered and said, "I told my negroes about two weeks ago that if they joined that blankety blank union I would kill every one of them."

I didn't go out with any of the parties in search of the negroes. Mr. Sam Austin and I were left near the Hoop Spur commissary to guard the road across where the public road crosses the railroad with orders to arrest all negroes who came by there armed. *Nown* came by. We stayed there from about 8 o'clock in the morning until about 12:30 and no negroes came by. At about 12:30 some man came by there in an automobile and told us they had a tip the negroes were going to attack the McCoy house and for us to go down there, which was a short distance from where we were, probably a half a mile. We went down there and remained until about 3 o'clock and there was no attack made and we left.

While at the McCoy house Lieut. Tappan was brought in in a dying condition and I saw him die on the bed in the McCoy house. Tappan was shot in the left side of the face and neck with a load of buck shot. While there I saw a bunch of negroes cross the railroad and dirt road going east about half a mile south of the McCoy house and disappear in a corn field on the east side of the road. I didn't see any negroe in that bunch with a gun or other weapon in his hand. If any negro in the crowd had a gun I didn't see it. I know positively no negro stopped in the road, kneeled, and made a shot or two up the road, because if he had done so I would have seen him as I was looking right at the bunch of negroes that crossed the road.

I was not immediately present when Clinton Lee was shot. I saw him after he was shot and also saw the hole in the rear end of the automobile and was told that he was killed by the shot that made that hole. There was no loose horse in the road between the McCoy house and the negroes. Automobiles were running up and down that road almost continuously, and if the negroes had desired to kill any white men they had ample opportunity to do it, as there was passing along the public road all the time. The local freight train on the Missouri-Pacific Railroad made several trips up and down the road during the day with the caboose loaded with men, and if the negroes had desired to kill anybody they could have killed them.

So far as I know no person traveling along the public highway was shot into or disturbed in any manner. I did not see a single negro with a gun or weapon of any kind during the whole day I was in the country.

I caught a local freight train and rode it up to Wabash, and from there I went back to Elaine, arriving about 3:30, where I remained until 7 or 8 o'clock and caught a train back to Helena. As I passed the Hoop Spur church house on the return trip I noticed that it had been burned down sometime during the day.

From the information I gathered while I was down there the whole trouble started because the white folks objected to the negroes having this union; that the negroes were organizing to employ counsel to represent them in getting settlements from their white landlords, and

the white folks objected to this procedure. I did not go down into the Elaine territory and more on this business. I was in Helena after the negroes were brought to the county jail, which was probably a week after the trouble started; and I was there off and on for several days at a time until the trials came off and during the trials.

I saw a great many negroes whipped on the third floor of the county jail to compel them to give evidence against themselves and others about the trouble.

I know that Mr. Smiddy conveyed a number of prisoners from the jail to be examined by The Committee of Seven and brought them back, and I know that the negroes were frequently whipped and otherwise tortured after they were taken before the Committee and brought back. They would take the negroes before this Committee and bring them back to the whipping room of the jail, and apply the lash until the negroes were willing to testify and would testify to anything that was wanted of them to save themselves from further torture. They were not only whipped but formaldehyde was put to their noses and were stripped naked and put into an electric chair which they had in the room to further frighten and torture them. I not only personally saw a great many negroes whipped with a leather strap that would cut the blood at every lick, but I whipped probably two dozen of them myself. I either whipped or helped to whip several of these petitioners, I don't know which, but I do remember that I helped to whip Frank Moore and J. E. Knox. To the best of my recollection Walter Ward, one of the witnesses against the petitioners, was whipped two or three times and put in the electric chair to make him testify against the petitioners.

Not all of the prisoners were whipped, but those that were not whipped saw others that were whipped and were told if they did not give the testimony that was wanted that they would get the same thing that those that were whipped got.

After a negro was whipped, as a general proposition, he was unable to walk back to his cell and was dragged back and dumped in and his clothes were thrown in after him. They were whipped so brutally and unmercifully that a physician had to be called in to take care of them afterwards. I do not now recall the physician's name, but I was told that he was a county physician. I was — him in the cells a number of times attending to the injuries of these negroes that had been whipped had received.

In this manner the testimony that was used in the trials of these cases and the others was acquired. So far as I know no negro made a voluntary statement that implicated any other negro in anything criminal, and I believe that I would have known it if it had been done. The negroes would be told that such and such a statement they had made was a blankety blank lie; That they knew such and such was true, and after being whipped the negroes would says, "Boss, yes, sir, that is so; I will say anything you want me to say,"—or something to that effect.

Court met in Helena the latter part of October or about the first of November, and a great many of these negroes were indicted. They were indicted without taking before the Grand Jury the wit-

nesses who were to give the evidence. Some person would go before the Grand Jury and tell them what such and such a person would testify to, and upon the information thus acquired the Grand Jury returned the indictment.

So far as I know the negro witnesses who were used in the trials before the petit jury never appeared before the Grand Jury at all, and they were the only one from whom they got any statements to connect any of the defendants with the commission of any offense.

At the trials of these cases the only evidence they had against these petitioners to connect them with any criminal offense was the evidence that we had extorted in the manner above set out. I was present during the trials in the court room. Large crowds thronged the court house and grounds, all of whom were unfriendly to the defendants, and desired their condemnation and death. The feeling against them was so bitter and so strong and so universal that it was absolutely unanimous and no man could have sat upon a jury in any of these cases and have voted for an acquittal and remained in Helena afterwards.

So far as I can now recall the jurors that sat upon these and the other cases were very briefly examined, and I do not remember that any juror was challenged by the defendant's counsel.

Shortly after the negroes were placed in the jail a mob was formed and came around the court house and jail for the purpose of lynching some of these negroes, but the presence of United States soldiers and advice of some level-headed prevented the purpose of the mob. They were told that if the mob would not lynch the negroes that they would be tried and convicted.

Those that did the whipping of the negroes in the Phillips County jail other than myself and Mr. Smiddy were Mr. Dick Dazell, Louis Anselman, Charlies Gist, and some others whose names I do not now recall.

I make this affidavit freely and voluntarily to the end that justice may be done and I stand ready at any time to testify in any court orally as to the facts and statements herein made.

And further affiant sayeth not*h*.

(Signed) T. K. JONES.

Subscribed and sworn to before me this 19th day of Sept. 1921.

[SEAL.] M. W. ALLEN,
Notary Public.

My commission expires Jan. 16, 1923.

Endorsed: Filed Sept. 21, 1921. Sid. B. Redding, Clerk.

Affidavit of H. F. Smiddy.

STATE OF TENNESSEE,
County of Shelby, ss:

H. F. Smiddy, being first duly sworn, deposes and says:

My name is H. F. Smiddy, age 32, and reside at 133 South Lauderdale Street, Memphis, Tennessee. I know the petitioners, Frank Hicks, Frank Moore, Ed Hicks, J. E. Knox, Ed Coleman and Paul Hall, and have known them since about October 1st, 1919. During September, October and November, 1919, I was employed by the Missouri Pacific Railroad Company as Special Officer, under Mr. T. K. Jones and worked from Wynne south to McGehee, Arkansas. During the latter part of November or early in December, I quit work for the Railroad Company and was employed by the City of Helena as plains clothes man under Chief of Police Sam Austin, and later, some two or three months, I quit this work and was employed as a Deputy Sheriff of Phillips County, Mr. Frank Kitchens being the Sheriff and Mr. J. R. Dalzell being Chief Deputy, under whose direction I worked for about one year, during which time Mr. Kitchens died and Mr. Dalzell was appointed to fill the unexpired term. I continued as Deputy until Mr. Jim Mays became sheriff. During all this time I was either making Helena my headquarters or was living there.

I was in Helena the night of September 30, 1919, the night the shooting occurred at the Hoop Spur Church near Hoop Spur, when Mr. W. A. Adkins was killed. Mr. Atkins was a Special Officer under Mr. T. K. Jones the same as I was, and we worked together. On the night of September 29th, Mr. Atkins and I were up all night trying to locate a negro charged with breaking into an interstate shipment, and we continued all day of the 30th and arrived in Helena about 7 p. m. Shortly afterwards Mr. Charles Pratt, who was a deputy sheriff of Phillips County came to me and Atkins and asked us to make a trip with him to Elaine. I told him I was too sleepy and tired and declined to go. Atkins agreed to go with him. I had supper with Atkins. Afterwards about 9 or 9:15 p. m. they got in an automobile in front of the court house, together with a negro by the name of Kid Collins, and left, and said they were going by Mr. E. J. Weyeth's house to get some whiskey. That was the last time I saw them that night. Shortly afterwards I went to the hotel and went to bed. Mr. T. K. Jones was also in Helena and had a room in the same hotel just across the hall from mine. About two o'clock that night Mr. Jones called me and told me that Mr. Dalzell had called him and told him that the men sent down to Elaine had some trouble north of Elaine, that there was some shooting and possible some one got hurt, and that they wanted us to go down with them as a posse was being organized for that purpose. We dressed and went with them. There were two cars left, Dick Dalzell's and Aunrey Burke's. In Mr. Dalzell's car there were, Mr.

Dalzell, Mr. Amos Jarman, Mr. Jones and myself. In the other car there were Mr. Burke, Sam Austin, Will Malliter and two others whose names I cannot now recall. We left Helena about 3 o'clock a. m. and arrived at Hoop Spur Church about 4:30 a.m. It was still dark. We found the dead body of Mr. Atkins lying about 30 feet north of a bridge across a slough about 40 yards north of the church house. The car in which Atkins, Pratt and Collins drove down was standing on the bridge near the south side of the bridge and we backed the car off the bridge to the north side.

On examination we found Atkins had been shot in the stomach with a load of buckshot and through the neck with a rifle or pistol. We found a horse and buggy on the north side of the church and a saddle lying in the road near the front of the church and a coat just north of Mr. Atkins.

We spent about 30 minutes there at the Hoop Spur Church house and left and went to Elaine about four miles south. While at the Hoop Spur Church house we saw no negroes and were not disturbed or interfered with by anybody. On arrival at Elaine Mr. Dick Dalzell telephoned Sheriff Kitchens at Helena for reinforcements after telling him what we had found at Hoop Spur.

About sun-up we left Elaine and returned to the Hoop Spur Church, several people from Elaine going with us. We arrived at Hoop Spur church about sun-up. We made a thorough examination of the church house, and on the inside we found a condition that showed that the last people who had been in the church had left there hurriedly. Benches were turned over, window lights broken out on all sides of the church, glass scattered all over the floor, women's and men's hats and coats scattered around over the floor and every evidence of a stampede in the church house. We also found some literature of the Farmers & Laborers' Household Union of America. We found nothing in the literature to indicate a criminal or unlawful purpose on the part of the organization. We found a large amount of this literature pertaining to this organization of this union but so far as I know none of it has ever been offered as evidence in Court.

On examination of the church house from the outside I found where the church had been shot into from the north side. There was a shed or building just north of the church that had been shot into also. The roof of this shed or building which slanted to the north and which plainly showed that it had been shot into from the north, and also the side of this shed had several bullet holes. About 8 o'clock in the morning Kid Collins, a negro who come down in the car with Atkins and Pratt, came to the church house and I had a conversation with him there. I asked him what had happened that night. He told me they came down there for the purpose of breaking up the meeting; that they stopped there in the road and Mr. Atkins begun shooting. He said that the negroes returned the fire and the shooting became general; that Mr. Atkins was killed; but he did not know what had become of Mr. Pratt. That he got one of the negroes himself, meaning that he had killed one of them, and that the negroes picked up the man he shot and carried him off.

That he had run away after the shooting and went to Wabash, which was about four miles north of Hoop Spur and "when I got to Wabash I notified the deputy sheriff at Wabash—called him to his door and told him about it," and he said, "What can I do; I cannot do nothing", and shut the door in the negro's face and went on back in the house.

After this conversation with Kid Collins we began to arrest negroes and bring them into the church house. We went out to their houses and around in the vicinity and brought them in. Some of them were in the fields picking cotton,—men, women, and chidre-.

So far as I know none of them we found around that morning. Between nine and ten o'clock on the morning of October 1st a great many people from Helena and other portions of Phillips County, and from other surrounding counties, began coming in, quite a large number of them, several hundred of them, and began to hunt negroes and shotting and killing them as the- came to them. The posse I was in was composed of fifty or sixty men. We left the church house and marched down a slough leading off from the church, which is the same slough that the bridge was over there near the church and is known as Govan Slough. Some of us were on one side of the slough and some on the other.

We began firing into the thicket from both sides thinking possibly there were negroes in the thicket and we could run them out and kill them. As we marched down the thicket to the southwest I saw about five or six negroes come out unarmed, holding up their hands, and some of them running and trying to get away. They were shot down and killed by members of the posse.

I didn't see a single negroe during all the man hunt that was armed, and I didn't see a single negro fire a shot. I was present when Jim Miller was killed and Arthur Washington was killed, and when Milliken Giles was injured. I shot Milliken Giles myself. He was in the edge of the thicket trying to hide. When I shot him he was not trying to shoot anybody and didn't have a gun. After I shot Milliken Giles five or six of us went to see if there were any more negroes in there where he was, and he was lying there shot through the chin and the bullet lodged in the back of his neck. We thought that he was dead. He did not die, but recovered and is now in the penitentiary serving a sentence on a plea of guilty.

Arthur Washington was killed as he ran away from his house. I saw him running away from his house and saw him a minute or two after he fell dead and walked up to him afterwards.

After Arthur Washington was shot we marched on down to where the thicket came to a point where the road crosses. At this road the thicket had run out and we turned around and were going to march back up the thicket, firing into the thicket from both sides. As we were marching back after we had gone about three hundred feet Mr. James Tappan was killed. He was on my side of the thicket, which was the east side of the thicket. He had gone down that side of the thicket and when we came to the point we turned around and were going back on the same side of the thicket. At the point where Mr. Tappan was killed the thicket was probably 30 feet wide. I am sure

that there were no negroes in the thicket at that point as we searched it thoroughly after the shooting of Tapp-n and found no negroes near anywhere he was shot.

Mr. Tappan was shot in the left side of the face. I am positive that this is true for the reason that we were going north on the east side of the thicket, which would have put his left side to the thicket. I furthermore know that when he was put in the automobile to be carried to the McCoy house we laid him on his right side, because the left side was wounded. He was shot with a load of buckshot at a short distance. I don't know who shot him, but I feel perfectly sure that he was accidentally killed by a member of our own posse on the other side of the thicket from us. About the time he was killed somebody hollered from both sides of the thicket, "Look out, we are shooting our own men." I know that this is possible because I was shot in the right shoulder by a stray shot of some kind from a member of our posse, and also Mr. Dalzell was shot over the left eye. I did not hear Mr. Herbert Thompson or anybody else holler out to the negroes to come out of the thicket and surrender "And you will not be harmed" or anything of the kind. When we started down that thicket it was the understanding with all of us that we would shoot the negroes as we came to them, which we did. I furthermore know that no negro ran out by where Mr. Tappan was lying after he was shot because if he had he would have been killed. I was standing within twenty feet of him when he fell, and a number of others, and some ran to him and stayed with him until he was taken to the house. I went to the house with him. If Mr. Herbert Thompson was there in the posse on either side of the thicket I don't remember it, and I don't remember seeing him around Mr. Tappan after he was shot.

It is not true that any negro got Mr. Tappan's gun. He had a 20 gauge Winchester pump hammerless shot gun. This gun was picked up by a member of the posse and carried over to the McCoy house, and what became of the gun after that I don't know. We picked Mr. Tappan up, put him in an automobile, and took him over to the McCoy house, which was about berween two hundred and three hundred yards away, and we took him in the house and laid him on the bed. This was probably between twelve and one o'clock. Shortly afterwards I came out of the house and there were several automobiles standing in front of the house with a number of men around. I got in an automobile with Mr. Clinton Lee. I sat down on the door on the right hand side of the car and the driver backed the car up to turn around and go back to the Hoop Spur church. As the car had turned around facing west a shot or two was fired from the south and one of the bullets struck the south side of the car, passed through Clinton Lee and went between my arm and my body, just touching my coat. Clinton Lee was mortally wounded—killed almost instantly. We took him out of the car and carried him into the McCoy house. I don't know who fired the shot. I didn't see anybody at the time the shot was fired. A short time before the shot I saw a bunch of negroes, probably between twenty and thirty, crossing the dirt road about half a mile south of the McCoy house

and get into a corn field on the east side of the dirt road. They were running,—seemed to be scared and seemed to be trying to get out of the way of the white folks. I didn't see any negro with a gun in his hand as he crossed the dirt road, although they were in plain view. I don't know who any of the negroes were in the gang that crossed the road. They crossed the railroad and dirt road a short distance below a house they call the Honk-a-tonk.

After the shooting of Lee we thought the Negroes that had crossed the road were going to make attack on the McCoy house, and we scattered out around the McCoy house and up and down the lane. We waited there for some time, but no attack was made of any kind and some of us left and went to Elaine, probably about three o'clock in the afternoon. I was among the party that left and went to Elaine, but who the parties were, I cannot name them all.

At Elaine we found the people there expecting an attack from the Negroes on the town, and a number of them got on top of the stores and houses, and a number of us went out in the field west, probably a quarter of a mile, where the Negroes were supposed to be hidden in the corn patch. We did not find any Negroes out there, and no attack was made, and no shot was fired upon anybody to my knowledge.

During that afternoon, October 1st, 1919, a crowd of men came into the vicinity of Elaine from Mississippi and began the indiscriminate hunting down, shooting and killing of Negroes. They shot and killed men, women, and children without regard to whether they were guilty or innocent of any connection with the killing of anybody, or whether members of the union or not. Negroes were killed time and time again out in the fields picking cotton, harming nobody. The next day, October 2nd, the soldiers came there and placed the town of Elaine under martial law and began going out through the surrounding country arresting Negroes and bringing them into Elaine, where they were placed in a school house under guard. Several hundred of them were gathered up under this manner. They were later taken to Helena and placed in the Phillips County jail.

I returned to Helena on the afternoon of October 2nd. I noticed as I passed by the Hoop Spur church that it had been burned down. I was informed that it was burned down on October 1st by white men; who did it I don't know, but I was told that it was burned down to destroy the evidence that it had been fired into by those that went there to break up the meeting.

After the Negroes were placed in jail a committee known as The Committee of Seven was selected to investigate the matter. This committee did make an investigation. They would call for a certain Negro, or negroes, to be brought before them from the jail and in a great many instances, probably a mojority of them, they were taken before this committee by me personally. While he was being examined by the committee I would sit and hear what the Negro had to say. Different members of the committee would ask the Negroes questions, and in no instance so far as I remember did a Negro give

the committee any information they wanted on fired examination. Different members of the committee would say to the Negro, don't you know so and so, and the Negro would answer "No, sir." Somebody else would say, you know you are lying about it, you know so and so is true, and you got to tell it. The Negro would answer, I don't know sir. Different members of the committee would curse and abuse the Negro. After they would get through with him I would take him back to the jail and would take him upstairs on the third floor to the whipping room and where the electric chair was located, where the Negro would be stripped naked and whipped from his head to his feet with a seven-pound leather strap. The Negroes were whipped unmercifully. Every time the strap was applied it would bring blood. I have personally applied the lash to a great number of these Negroes. We whipped them to make them tell what we wanted them to tell. We wanted them to tell facts that would convict themselves and others under arrest. We We would have before us in writing the statements made to the committee. We would whip them awhile and then read to them what they had said to the committee and ask them if that was false. If the Negro didn't say yes we would whip him some more. Then we would ask him is not certain other things true, which would reflect upon himself and others, and if he didn't answer they were true we would whip him again. I personally administered the lash and saw others do it to a great many Negroes until they were bleeding all over, and would be in such a physical condition until they would have to be picked up and dragged back to their cells in the jail and picked up and put on their bunk, where they were left for days where they were unable to take care of themselves, and other prisoners had to take care of them. A great many of them were in such a condition that a physician was called to administer to them. I personally administered the lash and saw others do it time and time again to a great many Negroes who had been previously whipped. The lash was applied on the old sores made at the first whipping, and usually the second whipping would get the Negro to say what was wanted if he had refused in the first instance. One of the petitioners in this case, Frank Moore, was whipped at least three times to try to compel him to give evidence against himself and the other petitioners, which he never did do. He stated that he would rather die in this manner than to tell something on himself or others that was not true. In addition to the whipping, and frequently during the course of the whipping, formal-*y*hyde was put to the nose of the Negroes to further torture and frighten them and compel them to give damaging evidence against themselves and others. In addition to this, there was an electric chair in the same room on the third floor of the Phillips County jail in which a great many Negroes were stripped naked and put and the current turned on to frighten and torture them into giving damaging statements against themselves and others. While the Negroes were being whipped they were stretched out on their stomachs on the concrete floor, with four Negroes holding them down, one holding each hand and one holding each leg. These four Negroes were prisoners in the jail, but were not charged with any con-

nection with the Elaine Riots. In this manner evidence was extorted from the Negroes which was used against them in their trials, and so far as my observation went, and I was present throughout all of it, the only evidence on behalf of the State that the State had was acquired in this manner. In other words, I mean to say that no Negro freely and voluntarily testified in these cases. They were either whipped and compelled to testify, or tortured in the other ways herein stated, or they were told if they didn't testify to what was wanted they would be treated in the same way. I do not mean to say that every Negro was whipped, but I do mean to say that every Negro that testified in these cases was either whipped or tortured by the other means herein stated, or saw what had happened to some other Negro and was told that if he didn't testify to what was wanted that he would get what these others had gotton.

In the cases of the Negroes who were not whipped, who were examined, I hea-d many of them say, "White folks, what do you want me to say, I will tell you anything you want?" To the best of my information and belief all of the petitioners were whipped or otherwise tortured with the exception of Ed Coleman.

Those that did the whipping of the negroes in the Phillips County jail other than myself and Mr. Jones were, as I remember, Mr. Dick Dalzell, Louis Anselman, Charley Gist, and some others whose names I do not now recall.

In the trials of these cases Walter Ward, George Green, and John Jefferson testified for the State. So far as I now remember they were the only ones that testified to anything to connect the petitioners with the killing of Clinton Lee. The substance of the testimony as I remember it was that they ganged up at Frank Moore's house on the morning of October 1st and along toward 10 or 11 o'clock they heard firing up the road and that Frank Moore said, "We will go up and help them out"; that they marched away and went up to near the McCoy house across the railroad, and as they crossed the dirt road Frank Hicks kneeled in the road and fired two shots. This was supposed to be at the time Clinton Lee was killed, and that Frank Hicks made the remark that if — had not been for the loose horse between him and the McCoy house he would have killed that guy; and that someone made the remark to Frank Hicks not to shoot. That after the shots were fired they crossed on over and went to Yellow Banks.

I know that Walter Ward was whipped and compelled to give this testimony, and I furthermore know that George Green and John Jefferson were told that if they didn't give the same evidence they would get what Walter Ward and the others got. To the best of my recollection Walter Ward was whipped about three times; had formaldehyde put to his nose; and was put into the electric chair before he agreed to testify to what he did testify to.

I furthermore know that a part of this testimony at least was false, in addition to it having been extorted from them. I know that no negro that we saw cross the road south of the McCoy house kneeled in the road and fired a gun because I was looking right at them when they crossed. I furthermore know that there was no

loose horse between us and the negroes, and I also know that no negro who crossed the dirt road down there had a gun in his hand. At least I didn't see any, and I believe if any negro had had a high power rifle or shot gun I would have been able to have seen it. I furthermore know that the only kind of a gun that could have been fired from the distance the negroes crossed the road and killed Clinton Lee would have been a high powered rigle, as, according to my best judgment, they crossed the road at least a half a mile away.

I furthermore know as the negroes crossed the road they crossed in a run and that they got out of sight into the corn field as quick as possible.

About three or four days after the negroes were brought to the Phillips County jail a mob was formed in Helena and gathered around the jail and court house for the purpose and with the intention of mobbing a large number of the negroes and would have done so but for the presence of a number of United States soldiers on guard about the jail and court house, and but for the advice of some level-headed citizens who told them that there had never been a lynching in Phillips County and if they would disperse and do no violence to anyone that they would see that the negroes were punished.

I was present during the trials of petitioners. So far as I now recall counsel for the defendants, who are here the petitioners, did not challenge any jurors, and so far as I now remember counsel asked the petit jurors very few questions and only such as were of a general nature. The jury in each case was quickly chosen. According to my best recollection Frank Hicks was tried separately from the other petitioners, who were tried jointly. Some of the jurors who sat upon these cases were in the posses that went to Elaine and in that vicinity to quell the so-called race riot. I cannot now remember just who they were, and am not able to give the names of such jurors. I furthermore know that there never was a chance for the petitioners, who were the defendants in these cases, to have been acquitted. No man could have sat upon any jury in Phillips County at these trials and have voted for an acquittal, and have continued to live in Phillips county. Large crowds attended the trials, thronged the court house and grounds, all of whom so far as I was able to observe were unfriendly to the petitioners and all of whom were bent upon their conviction and death. If any prisoner had by any chance been acquitted by a jury he could not have escaped the mob.

So far as I know, the negro witnesses who were used in the trial before the petit juryr never appeared before the grand jury at all, and they were the only ones from whom they got any statement to connect any of them with the commission of an offense.

The trials in each of these cases lasted a very short time, probably less than an hour. The jury was out from three to five minutes in each case, and brought in a verdict of guilty. From the beginning of the trouble and almost every day through to the closing of the trials the press of Helena, Little Rock, and Memphis carried highly inflammatory articles about these cases. It was charged by the Committee of Seven and published in the "Helena World" and other

newspapers was that the object of the union was to kill white people and take their property. But we were never able to verify this statement except from testimony that was extorted from negro witnesses by the methods and means herein set forth.

I do not know how many negroes were killed in all, but I do know that there were between two hundred and three hundred negroes killed that I saw with my own eyes. The only white men that I know of that were killed were Atkins, Tappan, Lee, Lily and two soldiers whom I do not know. One of the soldiers was not killed outright, but I understood that he later died.

I make this affidavit freely and voluntarily to the end that justice may be done. I know that the whole truth was not developed in these trials and that it is but a simple matter of justice to these petitioners that I make this affidavit setting forth the true facts.

I have testified in these and other cases growing out of this trouble, and as a witness for the State, and I did not tell all that I am now testifying to because I was not asked.

I did testify heretofore that I examined the Hoop Spur church house and found no bullet holes in it. This was true so far as it went. The first time I was at the Hoop Spur church house I examined it and it was dark and I was unable to see any bullet holes in the church and I didn't find any. The second time I did find them as before stated. Furthermore, I was instructed by those in authority that I should give no testimony of any character favorable to the defendants.

I stand ready to come before the Court in which this affidavit is filed, if any, and sustain the facts as herein detailed on oral testimony.

And further affiaint sayeth not.

(Signed) H. F. SMIDDY.

Subscribed and sworn to before me this 19th day of September, 1921.

[SEAL.] (Signed) M. W. ALLEN,
Notary Public.

My commission expires Jan. 16th, 1923.

Endorsed: Filed Sept. 21, 1921. Sid. B. Redding, Clerk.

UNITED STATES OF AMERICA,
Eastern District of Arkansas,
Western Division:

Be it remembered, That at a District Court of the United States of America, in and for the Western Division of the Eastern District of Arkansas, begun and holden on Monday, the 4th day of April, Anno Domini, One Thousand, Nine Hundred and Twenty-one, at the United States Court Room, in the City of Little Rock, Arkansas, the Honorable Jacob Trieber, Judge presiding and holding said Court, the following proceedings were had, to-wit: on September 21st, 1921:

No. 6246.

FRANK MOORE, ED. HICKS, J. E. KNOX, ED. COLEMAN, and PAUL HALL

vs.

E. H. DEMPSEY, Keeper of the State Penitentiary of the State of Arkansas.

Upon reading the petition for a writ of habeas corpus of the above named persons, and it appearing that they claim to be held in the State Penitentiary of the State of Arkansas, by E. H. Dempsey, Keeper of said prison, to be electrocuted by him on Friday, the 23rd day of September, 1921; that their detention is in violation of their rights under the constitution of the United States; and it appearing from the verified petition, and exhibits thereto that there is reasonable cause for the granting of said writ,

It is ordered by the Court that said writ be granted, returnable on September 26th, 1921, at 10 o'clock A. M., and the Clerk is directed to issue forthwith the writ of Habeas Corpus and deliver to the Marshal of the United States for the Eastern District of Arkansas, to be served on the said E. H. Dempsey, Warden of the State Penitentiary of the State of Arkansas, or the Deputy Warden, if the said Warden cannot be found, and also serve a copy of the writ on the Attorney General of the State of Arkansas.

And on September 26th, 1921, the following proceedings were had, to-wit:

No. 6246.

FRANK MOORE, ED. HICKS, J. E. KNOX, ED. COLEMAN, and PAUL HALL

vs.

E. H. DEMPSEY, Keeper of the State Penitentiary of the State of Arkansas.

Comes the respondent, by J. S. Utley, Attorney General of the State of Arkansas, and files herein his demurrer to the petition for Writ of Habeas Corpus.

Which Demurrer is in words and figures as follows, to-wit:

In the United States District Court, Western Division of the Eastern District of the State of Arkansas.

FRANK MOORE, ED. HICKS, J. E. KNOX, ED. COLEMAN, and PAUL HALL, Petitioners,

vs.

E. H. DEMPSEY, Keeper of the Penitentiary of the State of Arkansas, Respondent.

Demurrer.

Comes E. H. Dempsey, Keeper of the Penitentiary of the State of Arkansas, and demurs to the petition heretofore filed herein by Frank Moore, Ed Hicks, J. E. Knox, Ed Coleman and Paul Hall, and for cause of demurrer states that the said petition does not allege facts sufficient to entitle the petitioner to the relief prayed for in his petition.

Wherefore, respondent prays that the petition of said Frank Moore, Ed Hicks, J. E. Knox, Ed Coleman and Paul Hall be dismissed, and for all other general and proper relief.

(Signed) E. H. DEMPSEY,
Keeper of the Penitentiary.

(Signed) J. S. UTLEY,
Attorney General of the State of Arkansas.

Endorsed: Filed Sept. 26, 1921. Sid. B. Redding, Clerk.

And on September 27th, 1921, the following proceedings were had, to-wit:

No. 6246.

FRANK MOORE, ED. HICKS, J. E. KNOX, ED. COLEMAN, and PAUL HALL

vs.

E. H. DEMPSEY, Keeper of the State Penitentiary of the State of Arkansas.

This cause came on to be heard, the petitioners appearing by Murphy, McHaney & Dunaway, and S. A. Jones, Esqs., and the respondent, by J. S. Utley, Attorney General of the State of Arkansas, and the demurrer and motion to dismiss the writ heretofore granted herein, and after argument of counsel, the Court being well and sufficiently advised in the premises, doth sustain said demurrer and motion to dismiss.

It is therefore ordered that said demurrer and motion to dismiss the writ of habeas corpus heretofore issued be and the same is hereby sustained and that the writ of habeas corpus be and the same is hereby discharged.

And on the same day the following proceedings were had to-wit:

No. 6246.

FRANK MOORE, ED. HICKS, J. E. KNOX, ED. COLEMAN, and PAUL HALL

vs.

E. H. DEMPSEY, Keeper of the State Penitentiary of the State of Arkansas.

The above named petitioners having petitioned me for an appeal to the Supreme Court of the United States discharging the writ of habeas corpus heretofore issued and dismissing the petition, and having filed their assignment of errors, and the Court being of the opinion that there exists probable cause for an appeal in this cause, the appeal to the Supreme Court of the United States is allowed, returnable within thirty days, the petitioners to remain in the custody of the respondent in the meantime. Bond for costs on appeal is fixed at $300.00.

Which Assignment of Errors is as follows:

In the District Court of the United States for the Eastern District of Arkansas, Western Division.

FRANK MOORE, ED. HICKS, J. E. KNOX, ED. COLEMAN, and PAUL HALL, Petitioners,

vs.

E. H. DEMPSEY, Keeper of the State Penitentiary of the State of Arkansas, Respondent.

Assignment of Errors.

1. The above named petitioners assign as errors, that the Court erred in holding that the facts stated in the petition for the writ of habeas corpus and the exhibits filed therewith are insufficient to entitle them to any relief.

2. That the Court erred in sustaining the demurrer to the petition for the writ of habeas corpus by petitioners.

(Signed) MURPHY, McHANEY & DUNAWAY,
SCIPIO A. JONES,
Attorneys for Petitioners.

Endorsed: Filed September 27th, 1921. Sid. B. Redding, Clerk.

Which Petition for Appeal is as follows:

In the District Court of the United States for the Eastern District of Arkansas, Western Division.

FRANK MOORE, ED. HICKS, J. E. KNOX, ED. COLEMAN, and PAUL HALL, Petitioners,

vs.

E. H. DEMPSEY, Keeper of the State Penitentiary of the State of Arkansas, Respondent.

Petition for Appeal.

The above named petitioners, feeling themselves aggrieved by the judgment of this Court Discharging the writ of habeas corpus, and dismissing their petition for said writ, pray an appeal to the Supreme Court of the United States and file herewith their assignment of errors.

(Signed) MURPHY, McHANEY & DUNAWAY,
SCIPIO A. JONES,
Attorneys for Petitioners.

Endorsed: Filed September 27th, 1921. Sid. B. Redding, Clerk.

And on the same day the following proceedings were had, to wit:

No. 6246.

FRANK MOORE, ED. HICKS, J. E. KNOX, ED. COLEMAN, and PAUL HALL

vs.

E. H. DEMPSEY, Keeper of the State Penitentiary of the State of Arkansas.

Come the petitioners, by Murphy, McHaney & Dunaway, and S. A. Jones, Esqs., their attorneys, and present to the Court their bond on appeal, in the sum of Three Hundred Dollars, with H. A. Powell and G. W. S. Ish, as sureties, which bond is approved by the Judge of this Court as sufficient. And said Petitioners also file their citation, with service of the same duly accepted by J. S. Utley, Attorney General of the State of Arkansas.

Which bond for appeal is as follows:

Know all men by these presents,

That we, Frank Moore, Ed. Hicks, J. E. Knox, Ed. Coleman and Paul Hall as principals, and H. A. Powell, and G. W. S. Ish, as sureties, are held and firmly bound unto E. H. Dempsey, as Keeper of the State Penitentiary of the State of Arkansas in the full and just sum of Three Hundred Dollars, to be paid to the said E. H. Dempsey, as Keeper of the State Penitentiary of the State of Arkansas, heirs, executors, administrators, or assigns: to which payment well and truly to be made, we bind ourselves, our heirs,

executors, and administrators, jointly and severally by these presents. Sealed with our seals, and dated this 27th day of September, in the year of our Lord one thousand nine hundred and Twenty-one.

Whereas, lately at the April term A. D. 1921, of the District Court of the United States for the Western Division of the Eastern District of Arkansas, in a suit depending in said Court between Frank Moore, Ed. Hicks, J. E. Knox, Ed. Coleman, and Paul Hall, Petitioners, and E. H. Dempsey, as Keeper of the State Penitentiary of the State of Arkansas, Respondent, was rendered against the said Frank Moore, Ed. Hicks, J. E. Knox, Ed. Coleman, and Paul Hall, and the said Frank Moore, Ed. Hicks, J. E. Knox, Ed. Coleman, and Paul Hall, have obtained an appeal of the said Court to reverse the judgment in the aforesaid suit, and a Citation directed to the said E. H. Dempsey, as Keeper of the State Penitentiary of the State of Arkansas, citing and admonishing him to be and appear in the United States Supreme Court, at the City of Washington, D. C., thirty days from and after the date of said Citation.

Now the condition of the above obligation is such, That if the said Frank Moore, Ed. Hicks, J. E. Knox, Ed. Coleman and Paul Hall, shall prosecute said appeal to effect, and answer all damages and costs if they fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of

FRANK MOORE,
ED. HICKS,
J. E. KNOX,
ED. COLEMAN,
PAUL HALL,
By E. L. McHANEY, [SEAL.]
Attorney.
H. A. POWELL. [SEAL.]
G. W. S. ISH. [SEAL.]

Approved by
JOHN H. COTTERAL,
Judge.

Endorsed: Filed Sept. 27th 1921. Sid. B. Redding, Clerk.

FRANK MOORE, ED. HICKS, J. E. KNOX, ED. COLEMAN, and PAUL HALL

vs.

E. H. DEMPSEY, Keeper of the Arkansas State Penitentiary.

I, John H. Cotteral, the presiding judge in the above entitled cause in which the petition for a writ of habeas corpus of the petitioners was denied, do hereby certify that there exists probable cause for the appeal.

Witness my hand and seal as such Judge this 27th day of September, A. D. 1921.

JOHN H. COTTERAL,
U. S. District Judge by Assignment.

THE UNITED STATES OF AMERICA:

To E. H. Dempsey, Keeper of the Arkansas State Penitentiary, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States thirty days from and after the day this Citation bears date, pursuant to a writ of error, filed in the Clerk's office of the District Court of the United States for the Western Division of the Eastern District of Arkansas, wherein Frank Moore, Ed. Hicks, J. E. Knox, Ed. Coleman and Paul Hall are appellants, and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellants, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable John H. Cotteral, Judge of the Circuit Court of the United States for the Eastern District of Arkansas, this 27th day of September in the year of our Lord one thousand nine hundred and twenty one.

JOHN H. COTTERAL,
United States District Judge for the Eastern District of Arkansas.

I hereby acknowledge receipt of copy of this citation on this Sept. 28, 1921.

J. S. UTLEY,
Attorney General of the State of Arkansas,
Counsel for Appellee.

Filed Sept. 28th, 1921.
SID. B. REDDING, *Clerk.*

UNITED STATES OF AMERICA,
Eastern District of Arkansas,
Western Division:

I, Sid B. Redding, Clerk of the District Court of the United States for the Eastern District of Arkansas, in the Eighth Circuit, hereby certify that the foregoing writings annexed to this certificate are true, correct and compared copies of the original remaining of record in my office, at Little Rock, Arkansas, of the Assignment of Errors, Record and all proceedings on the petition for writ of habeas corpus of Frank Moore, Ed. Hicks, J. E. Knox, Ed. Coleman, and Paul Hall, against E. H. Dempsey, as Keeper of the State Penitentiary of the State of Arkansas.

In witness whereof, I have hereunto set my hand and the seal of said Court, this 20th day of October in the year of our Lord, one Thousand Nine Hundred and Twenty-one and of the Independence of the United States of America, the One Hundred and Forty-sixth

Attest:

[The Seal of the District Court, Western Division, U. S. A.]

SID B. REDDING,
Clerk.

In the Supreme Court of the United States.

No. —.

FRANK HICKS, Appellant,

vs.

E. H. DEMPSEY, Keeper of the Arkansas State Penitentiary, Appellee,

and

No. —.

FRANK MOORE, ED. HICKS, J. E. KNOX, ED. COLEMAN, and PAUL HALL, Appellant-,

vs.

E. H. DEMPSEY, Keeper of the Arkansas State Penitentiary, Appellee.

Stipulation of Counsel as to Printing of Records and Consolidation of Causes.

We, the undersigned, counsel for appellants and appellee, hereby agree that the above entitled causes may be submitted to the Honorable, the Supreme Court of the United States, upon the printed record in the case of Frank Moore, Ed. Hicks, J. E. Knox, Ed. Coleman, and Paul Hall, appellants, vs. E. H. Dempsey, Keeper of the Arkansas State Penitentiary, Appellee, and that the record in the Frank Hicks case need not be printed. We further agree that these causes may be consolidated and submitted together upon one printed record, as aforesaid, and briefs in said causes.

Respectfully submitted,

E. L. McHANEY,
M. E. DUNAWAY,
S. A. JONES,
Attorneys for Appellants.
J. S. UTLEY,
Attorney. General, Attorney for Appellee.

[Endorsed:] File No. 28549. Supreme Court U. S., October Term, 1921. Term No-. 594 & 595. Frank Hicks, Appellant, vs. E. H. Dempsey, Keeper of the Arkansas State Penitentiary. Frank Moore et al., Appellants, vs. E. H. Dempsey, Keeper of the Arkansas State Penitentiary. Stipulation that cases be consolidated and heard on record in 595. Filed Nov. 14, 1921.

Endorsed on cover: File No. 28550. E. Arkansas D. C. U. S. Term No. 595. Frank Moore, Ed. Hicks, J. E. Knox et al., appellants, vs. E. H. Dempsey, keeper of the Arkansas State penitentiary. Filed October 24th, 1921. File No. 28550.

Supreme Court of the United States

OCTOBER TERM, 1922

[No. 128.]

FRANK MOORE, ED. HICKS, J. E. KNOX, ET AL.,
APPELLANTS,

v.

S. H. DEMPSEY, KEEPER OF THE ARKANSAS STATE PENITENTIARY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

BRIEF FOR THE APPELLANTS.

MOORFIELD STOREY,
Counsel for the Appellants.

[illegible]

Supreme Court of the United States

OCTOBER TERM, 1922

[No. 199.]

FRANK MOORE, ED. HICKS, J. E. KNOX, ET AL.,
APPELLANTS,

v.

E. H. DEMPSEY, KEEPER OF THE ARKANSAS STATE PENITENTIARY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

BRIEF FOR THE APPELLANTS.

MOORFIELD STOREY,
Counsel for the Appellants.

BOSTON
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(INCORPORATED)
1923

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Supreme Court of the United States

OCTOBER TERM, 1922

[No. 199.]

FRANK MOORE, ED. HICKS, J. E. KNOX, ET AL.,
APPELLANTS,

v.

E. H. DEMPSEY, KEEPER OF THE ARKANSAS STATE PENITENTIARY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

STATEMENT OF THE CASE.

This is a petition for a writ of habeas corpus brought by five citizens and residents of the State of Arkansas against the keeper of the Arkansas State Penitentiary (Record, pp. 1–10).

The petitioners are Negroes who have been indicted, tried and convicted of murder for killing one Clinton Lee and are now under sentence of death. They petitioned the District Court of the United States for a writ of habeas corpus, but on demurrer to that petition the court without hearing any evidence on the facts sustained the demurrer and dismissed the petition (Record, pp. 100–101). The petitioners having appealed and filed an assignment of errors, the court, "being of opinion that there exists probable cause for an appeal in this cause," allowed the appeal (Record, p. 102).

Assignment of Errors.

The appellants claim that the court erred in ruling that the facts stated in the petition were not sufficient to entitle the petitioners to relief (Record, p. 102).

The petition for the writ of habeas corpus sets forth the case, and in stating it the historical order of events will be adopted, not the order in the petition.

The Origin of the Trouble.

The petitioners say "that prior to October 1, 1919, they were farmers, share croppers; that nearly all the land in Phillips County is owned by white men; that same is rented out to share croppers to be tilled on shares, one half to the tenant and the other half to the owner; that for some years past there has grown up a system among the land owners of furnishing the negro tenants supplies on which to make crops and which is calculated to deprive and does deprive the negro tenants of all their interest in the crops produced by them; that in pursuance of this system, they refused to give their share croppers any itemized statement of account of their indebtedness for supplies so furnished, refused to let them move or sell any part of their crops, but themselves sell and dispose of the same at such prices as they please, and then give to the negroes no account thereof, pay them only such amount as they wish and in this way kept them down, poverty stricken and effectually under their control; that for the purpose of protecting themselves, if possible against the oppressive and ruinous effects of this system, the negro farmers organized societies, with the view of uniting their financial resources in moral and legal measures to overcome the same, which fact became quickly known to the plantation owners; that such owners were bitterly opposed to such societies, sought to prevent their organization, ordered the members to dis-

continue their meetings and sought by every means they could employ to disrupt them; that on the 30th day of September, 1919, petitioners and other members of the Ratio Lodge, near Elaine, learned that some of the negro farmers of a near-by plantation had employed U. S. Bratton, an attorney of Little Rock, Arkansas, to represent them in effecting a settlement for them with their landlords, or if he could not, to institute legal proceedings to protect their interests, and that either he, or his representatives, would be there on the following day to meet with all the parties concerned, perfect the arrangements, and learn all the facts as far as possible, and they decided to hold a meeting with the view of seeing him while there, and engaging him as an attorney to protect their interests; that accordingly they met that night at Hoop Spur Church house" (Record, pp. 3–4).

That while petitioners with others of their race were peaceably and lawfully assembled in their church with no unlawful object in view, and with no desire or purpose to injure any one, white persons who had come in automobiles to break up the meeting began firing guns or pistols from the outside into and through the church, causing a great disturbance of those assembled; that one Adkins who was in the attacking party was killed either by members of his own party or by some other person unknown to the petitioners; that the attacking party sent out word to the county seat that Adkins had been killed by Negroes, being shot down in cold blood while on a peaceful mission; that the reports spread like wildfire into other counties and into other States, notably the State of Mississippi; that early the next day a large number of white men "armed themselves and rushed to the scene of the trouble and to adjacent regions and began the indiscriminate hunting, shooting and killing of negroes;" that they were later joined by white men from adjacent counties and from the State of Mississippi, and that a great many innocent Negro men and women, many of whom were pick-

ing cotton in the fields, were killed in cold blood; that Clinton Lee was shot during the morning; that the petitioners, together with a large number of their race, both men and women, were taken to the Phillips County jail, at Helena, incarcerated therein, and charged with murder (Record, pp. 1, 2).

The Committee of Seven and its Acts.

A committee of seven composed of leading Helena business men and officials, to-wit: Sebastian Straub, Chairman, H. D. Moore, County Judge, F. F. Kitchens, Sheriff, J. G. Knight, Mayor, E. M. Allen, J. E. Horner and T. W. Keesee, was selected by the municipal and county authorities (Record, pp. 2, 11, 12), or as is stated by the committee in a letter to the Governor of Arkansas "appointed by him" (Record, p. 71) "for the purpose of probing into the situation and picking out those to be condemned to death and those to be condemned and sentenced to the penitentiary" (Record, p. 2). That shortly after they were placed in jail, "a mob was formed in the city of Helena, composed of hundreds of men, who marched to the county jail for the purpose and with the intent of lynching your petitioners and others, and would have done so but for the interference of United States soldiers and the promise of some of said committee and other leading officials that if the mob would stay its hand they would execute those found guilty in the form of law" (Record, p. 3). "That said committee assumed charge of the matter and proceeded to have brought before them a large number of those incarcerated in jail and examined them regarding their own connection and the connection of others charged with participation in said trouble; that if evidence unsatisfactory to said committee was not given they would be sent out and certain of their keepers would take them to a room in the jail which was immediately adjoining and a part of the courthouse building where said committee was sitting, and torture them by

beating and whipping them with leather straps with metal in them, drawing the blood at every lick until the victims would agree to testify to anything their torturers demanded of them; that there was also provided in said jail, to further frighten and torture them, an electric chair, in which they would be put naked and the current turned on to shock and frighten them into giving damaging statements against themselves and others; also strangling drugs were put up their noses for the same purpose and by these methods and means false evidence was extorted from negroes to be used and was used against your petitioners" (Record, pp. 2, 3).

THE CREATION OF PUBLIC OPINION.

"Petitioners further say that on every day from October 1 until after their trial on November 3, 1919, the press of Helena and the State of Arkansas carried inflammatory articles giving accounts of the trouble, which were calculated to arouse and did arouse bitter feeling against your petitioners and the other members of their race; that on October 7, 1919, the Helena *World*, a newspaper published and printed in the city of Helena, and having a wide and almost universal circulation throughout said county, published an article written and given out by Mr. E. M. Allen, a member of said committee of seven, for and on behalf of said committee, purporting to give the facts concerning what he called 'not a race riot,' but a 'deliberately planned insurrection of the negroes against the whites,' and alleges that their Union was 'established for the purpose of banding negroes together for the killing of white people'" (Record, p. 3, pp. 11–14). In this he said:

> "The fight at Hoop Spur was unpremeditated as far as the negroes were concerned as they were organizing their forces Wednesday morning to attack and capture Elaine but when runners informed the leaders that white men were entering the woods at Hoop Spur they decided to go

up and wipe out the little gang that was reported to be there, before entering upon the more serious task of capturing Elaine. They underestimated the size of the force from Helena and the battle resulted.

"Every negro who joined these lodges was given to kill white people. Unquestionably the time for attack had been set but plans had not been entirely perfected and the shooting of the officers brought on the insurrection ahead of schedule. . . .

"I have cross-examined and talked to at least one hundred prisoners at Elaine. They belong to different lodges in that section. The stories they tell are almost identical as to the promises and representations made by Hill. He even told them probably some of the negroes would be called upon to die before 'Equal rights' would be assured, but they must look upon themselves as crusaders and die if necessary to secure the freedom of the other members of their race" (Record, p. 14).

An examination of the statements attributed to Hill shows that they were the talk of a swindler and not of a conspirator (Record, pp. 12–13). Mr. Allen's statement itself says, "He simply played upon the ignorance and superstition of a race of children" (Record, p. 14).

The Indictment and Trial.

It is further alleged that the Circuit Court of Phillips County convened on October 27, 1919; "that a grand jury was organized which was composed wholly of white men, and which included one of the committee of seven and many who were in the posses organized to fight the negroes; that during its session the petitioners and others of the prisoners were frequently carried before it in an effort to extract false incriminating admissions, and that both before and after they were frequently whipped, beaten and tortured; that those in charge had some way of learning when the evidence was unsatisfactory to the grand jury, and this

was always followed up by beating and whipping; that by these methods some of the negroes were forced to testify against the others, including two who testified against the petitioners;" that on the 29th October a joint indictment was found against the petitioners, accusing them of the murder of Clinton Lee whom they had never seen or known; that on the 3d November, 1919, they were taken into court and told of the charge and that a certain lawyer was appointed to defend them; that they were given no chance to employ an attorney of their own choice. The attorney appointed "did not consult with them, took no steps to prepare for their defense, asked nothing about their witnesses, though there were many who knew the petitioners had nothing to do with the killing of Lee; that they were immediately placed on joint trial before an exclusively white jury," and that only the witnesses for the State were called, no witnesses being called by the counsel for the defense; that the jury went out and in two or three minutes returned with the verdict of guilty of murder in the first degree, which was followed by a sentence to death by electrocution on December 27, 1919. They further say that the trial lasted less than an hour (Record, pp. 4, 5).

THE INFLUENCE OF THE MOB ON COURT AND JURY.

Petitioners further say "that large crowds of white people bent on petitioners' condemnation and death thronged the courthouse and grounds and streets of Helena during the trial of petitioners and the other negro defendants; that on account of the great publicity given theirs and the other cases, on account of their being charged with connection with an insurrection against the white people, and that four or five white men were killed, on account of the fact that they are negroes, and those who run the court, the Judge upon the bench, the sheriff, the clerk and all the jurors being white men, on account of the fact that it was stated and

widely published that the purpose of the negroes was to kill the whites and take their property, and on account of all the race prejudice which normally exists and which was enhanced a thousand-fold at the time, by bitterness beyond expression, it was impossible for them to get a fair and impartial trial in said court before a jury of white men; that the attorney appointed to defend them knew that the prejudice against them was such that they could not get a fair and impartial trial before a white jury of said county, yet he filed no petition for a change of venue, did not ask the court for time to prepare a defense, and did nothing to protect their interests; that the court did not ask them whether they had counsel, or desired to employ counsel, or were able to do so; but simply said a lawyer, whom he named, would defend them; that they have, therefore, not had a trial, have had no opportunity to make a defense, but that their case was closed against them as virtually and effectually as if on a plea of guilty; that if they had been given the opportunity they would have employed counsel of their own choice and have made a defense, their ability to do so having been demonstrated since their conviction; that the feeling against petitioners was such that it overawed the Judge on the bench, the jury, the attorney appointed to defend them and every one connected with said court; that all, Judge, jury and counsel, were dominated by the mob spirit that was universally present in court and out, so that if any juror had had the courage to investigate said charge with any spirit of fairness, and vote for an acquittal, he himself would have been the victim of the mob; that, such was the intensity of feeling against petitioners and the other defendants, that had counsel for them objected to the testimony of the two witnesses against them, said Ward and Jefferson, on the ground that it was extorted by beating and torture, as they are advised he should have done, he himself would have been the victim of the mob; . . . that petitioners were ignorant of their rights, had never been in court before, and had

counsel asked them about this testimony they would have told him how it was obtained; that through fear of the mob spirit no witness was called in their behalf and they themselves were advised not to take the stand on their own behalf; that as a result of the mob domination of court, counsel and jury, the court, although a court of original jurisdiction in felony cases, lost its jurisdiction by virtue of such mob domination, and the result was but an empty ceremony, carried through in the apparent form of law, and that the verdict of the jury was really a mob verdict, dictated by the spirit of the mob and returned because no other verdict would have been tolerated, and that the judgment against them is, therefore, a nullity" (Record, pp. 5–6).

This is in substance the case stated in the petition and on demurrer must be taken as true, but the allegations are abundantly sustained by other evidence.

EVIDENCE IN RECORD CONFIRMING ALLEGATIONS OF PETITION.

Evidence of Public Feeling.

The atmosphere which surrounded the courtroom where the appellants were tried is shown by the written evidence which is found in the record. The statement made by Allen for the committee of seven that the disturbance in which so many Negroes and a few whites were killed was a "deliberately planned insurrection of the negroes against the whites," that "they were organizing their forces Wednesday morning to attack and capture Elaine; that unquestionably the time for attack had been set but plans had not been entirely perfected and the shooting of the officers brought on the insurrection ahead of time" was published to create a public opinion against the Negroes. It could have had no other effect, but the record fails to disclose any evidence to support its allegations. "The list of those the negroes plotted to kill on which Allen's name was" was never produced; nor were any of the other papers confiscated (Record, p. 12).

The letter of the committee to the Governor is proof positive of the feeling. In it they say:

> "With all the provocation our people refrained from mob violence. The reason they did this was that this committee gave our citizens their solemn promise that the law would be carried out";

and further that if the Governor shows mercy to the men convicted, it would be difficult if not impossible to prevent mob violence, *i.e.*, lynching.

There can be no question what the committee's promise meant, especially when we find in the same letter:

> "There were 150 negroes legally guilty of murder in the first degree—actively present and assisting in the wilful and deliberate murder of white citizens—and this Committee assisted in seeing that only *leaders* were brought to trial" (Exhibit E, p. 71).

This is abundantly confirmed by the resolution adopted by the Richard L. Kitchens Post, American Legion, which contains the statement that "when the guilty negroes were apprehended, a solemn promise was given by the leading citizens of the community, that if these guilty parties were not lynched, and let the law take its course, that justice would be done and the majesty of the law upheld."

This is followed by a protest against any commutation of the sentence on the ground that the appellants and six others were "ring leaders and guilty murderers" (Exhibit H, Record, pp. 76, 77).

If further proof were needed, we find it in the resolution of the Helena Rotary Club "attended by seventy-five members, representing seventy-five leading industrial and commercial enterprises of the city" concurring in the resolution of the Richard L. Kitchens Post (Exhibit I, p. 78), and the action of the Lions Club of Helena at a meeting at-

tended by sixty members, representing sixty leading industrial and commercial enterprises of this city to the same effect (Exhibit J, p. 78).

The combined influence of such men as these insisting that these men were guilty and must be convicted must have created an atmosphere against which the court found it impossible to contend. The language that "justice will be done and the majesty of the law upheld" does not mean proceedings resulting in an acquittal. Only conviction followed by execution would have been regarded as an equivalent for lynching.

Proof that the mob was in control is found in the treatment of the counsel who came from Little Rock to advise the Negroes, who was charged with murder, then indicted for barratry and finally smuggled out of town with the aid of the judge who presided at the trial of these petitioners (Record, p. 4).

EVIDENCE THAT THE WITNESSES WERE TERRORIZED.

The fact that the committee met and terrorized the witnesses by beating and otherwise in order to make them testify against the convicted men is not only proved by the testimony of the witnesses themselves (see affidavit of WALTER WARD, Exhibit B, Record, p. 15, and affidavit of JOHN JEFFERSON, Exhibit C, Record, p. 18), but by the testimony of the white men who did the beating. (See affidavit of T. K. JONES, Special Agent for the Missouri Pacific Railroad in charge of the Memphis Division and H. F. SMIDDY, special officer employed by the Missouri Pacific Railroad under Mr. Jones, and later employed by the city of Helena as plain-clothes man, and afterward as deputy sheriff of Phillips County in which the town of Helena was situated (Record, pp. 86 to 99, both inclusive.))

Testimony of Smiddy.

Mr. Smiddy testifies to the condition of the church and the indications that it was attacked and shot into from the north, that they found some literature of the Farmers and Laborers Union, but "nothing to indicate a criminal or unlawful purpose on the part of the organization" (p. 92). He also testifies as to what was done on the morning of October 1st, stating that "a great many people from Helena and other portions of Phillips County and other surrounding counties began coming in, quite a large number of them, several hundred of them, and began to hunt negroes and shooting and killing them as they came to them." His posse was composed of fifty or sixty men (Record, p. 93).

> "We began firing into the thicket from both sides, thinking possibly there were negroes in the thicket and we could run them out and kill them. . . . I saw five or six negroes come out unarmed holding up their hands, some of them running and trying to get away. They were shot down and killed by members of the posse" (Record, p. 93). "I did not see a single negro fire a shot. I was present when Jim Miller and Arthur Washington was killed and Milliken Giles was injured. I shot Milliken Giles myself" (Record, p. 93). "He was in the edge of the thicket trying to hide. When I shot him he was not trying to shoot anybody and didn't have a gun. . . . Arthur Washington was killed as he ran away from his house."

Smiddy was there when Mr. James Tappan was killed, and felt

> "perfectly sure he was accidentally killed by a member of our own posse on the other side of the thicket from us" (Record, pp. 93, 94). "I was shot in the right shoulder by a stray shot from some member of our posse," and so was Mr. Dalzell (Record, p. 94).

Smiddy was in the automobile with Clinton Lee who was shot by a bullet coming from the south side. He did

not see anybody at the time shot was fired. A short time before the shot there were twenty or thirty Negroes crossing the dirt road and going into the cornfield on the east side. "They were running,—seemed to be scared and trying to get out of the way of the white folks. I did not see any negro with a gun in his hand and they were in plain view." During the afternoon "a crowd of men came into the vicinity of Elaine from Mississippi and began the indiscriminate hunting down, shooting and killing of negroes. They shot and killed men, women and children" who had no connection with the killing, and whether members of the Union or not (p. 95).

He describes how the Negroes were whipped and treated cruelly to compel them to testify: states that frequently during the course of whipping formaldehyde was used to further torture and frighten them, and describes the electric chair (Record, p. 96). He says, "No negro freely and voluntarily testified in these cases," and tells how they were forced (Record, p. 97).

To the best of his recollection Walter Ward was whipped three times to make him give the testimony, and formaldehyde put to his nose. He says he knows that no Negro crossed the road south of McCoy's house, knelt in the road and fired a gun, because he was looking right at them. He also knows there was no loose horse between them and the Negroes and "that no negro who crossed the dirt road down there had a gun in his hand" (pp. 97, 98).

He was present at the trial and knows that there "never was a chance for the petitioners who were defendants in these cases to have been acquitted. No man could have sat upon any jury at these trials and have voted for an acquittal and continued to live in Phillips County." Large crowds attended the trial and all so far as he was able to observe "were bent upon their conviction and death. If any prisoner by any chance had been acquitted by a jury, he could not have escaped the mob" (p. 98).

"I do know that there were between two hundred and three hundred negroes killed that I saw with my own eyes. The only white men that I knew of that were killed were Atkins, Tappan, Lee, Lily and two soldiers whom I do not know" (p. 99).

Testimony of Jones.

Mr. Jones in like manner testified that he saw the Negroes whipped, saw the formaldehyde put into their noses, that he helped to whip Frank Moore and J. E. Knox, that he probably whipped two dozen himself. He says, "So far as I know no negro made a voluntary statement that implicated any other negro in anything criminal and I believe I would have known it if it had been done" (p. 89). He says that while at the McCoy house "I saw a bunch of negroes cross the railroad and dirt road going east. . . . I didn't see any negro in that bunch with a gun or other weapon in his hand. . . . I know positively that no negro stopped in the road, kneeled and made a shot or two up the road, because if he had done so I would have seen him as I was looking right at the bunch of negroes that crossed the road" (Record, p. 88).

The witnesses Jones and Smiddy are white men and responsible. Their testimony is clear and positive, and confirms the statements of the petitioners in all respects. If these affidavits are true, the petitioners were entirely innocent of the crime for which they were convicted, and no motive for making such affidavits, if they were false, can be suggested.

Evidence at the Trial.

If the only evidence in the case was the record of the trial, it would be clear that the appellants were not fairly tried. A statement of the proceedings follows, and is perhaps needlessly long, but the aim has been to omit nothing essential.

The first witness called at the trial was R. L. BROOKS, a white man, who testified that he was with Lee on the 1st of October, and that Lee was sitting in an automobile when he was hit by a bullet from a rifle which caused his death in about five minutes. Witness testified that he heard two bullets, and that between them there was an interval about as long as it would take a man to unload and reload his gun. The bullet came from the south. He had not the least idea who fired the shots, and neither heard the report of the gun nor saw the man who fired it (Record, pp. 28, 29).

The next witness was Dr. O. PARKER, who testified that he was present when Lee was brought in and saw him die, but did not examine the body (Record, p. 29).

The next witness was TOM FAULKNER, who testified that he knew Clinton Lee and was fifty to one hundred feet away from him when he was killed; that he was then in a car in front of the McCoy house with all the cars; that about the time the shots were fired he saw three Negroes probably three or four hundred yards south of the house, saw one fire two shots toward the car, but he did not know who the Negroes were and could not identify any of them (Record, pp. 30, 31).

It will be observed that he only saw three Negroes, not a considerable body.

The next witness was JOHN JEFFERSON who testified that he knew the several defendants, apparently calling the appellant indicted as Ed Coleman by the name of Sweat Coleman. He testified that he belonged to the Farmers Household and Progressive Union of which Ed Hicks was the president of Elaine Lodge. Said he learned that Joe Knox was the president of it. He knew none of the board members other than the president, vice-president and secretary. Asked whether any of the men Moore, Coleman and Hall were leaders or not, answered, "I knew Frank Moore was there, but I don't know whether he was a leader, nor the other two men you called." He said that when he went to the lodge they had guns, and said they were "looking for

them to come down and pick them up." "Looking for who?" "Looking for the white folks to come down there and break the meeting up." "What did they have their guns for?" "They had their guns for protection to fight with." First time he went he had no gun, and when asked what he brought to fight with replied that he brought nothing. He went to only one meeting after he joined and that was the Friday night before the trouble. In answer to a leading question, that he met Thursday night before the trouble. He knew Hicks, Frank Moore and Sweat Coleman were there. Did not see Knox or Hall there. Testified these fellows had guns there that night.

On Wednesday morning he went out to Frank Moore's who lived opposite Sweat Coleman, the next house being that of Frank Hall, who was Paul Hall's brother. Got there before daylight. There were forty-five or fifty scattered around in the dark sitting down talking. Had guns of various sorts. Saw Moore, Coleman and Paul there, but did not see Knox and Hicks before daylight. They were all sitting around talking. Frank Moore was in the house. Asked what he saw, witness replied, "I heard him come out of the house." He said "they had been into it at Hoop Spur, and they had killed a man; he had taken a 45 automatic and pair of handcuffs." That he saw Hicks and Knox later in the day. All there, some over at his house, some at Sweat's house, some at Paul's house, and some around the bushes. About twelve or one o'clock heard Frank Moore say: "Don't you hear that shooting? Come on, let's go out there and help them people out."

> "And everybody came up there and he paired us all up, put us two and two, Frank Moore, Hicks and Knox. Moore in front said, 'Let's go and help them people out in the shooting. Just go out there and help them out.' Moore was in front, Hicks along in the middle walking along with the rest, Knox at the rear end. He said, 'If anybody breaks ranks he was going to shoot them down.' Paul Hall was in

the gang, but don't know where he was. Sweat Coleman was in the gang not doing anything more than the rest of them, there with his gun. Never heard Sweat say anything. I was near the rear not far from Ed Hicks. All of them had guns. We come out through the field about a quarter of a mile from the house and we saw this crowd of men. This fellow Moore stopped. Hicks said, 'Let's go across this way and cut them off.' Asked who, he answered, 'These white gentlemen at this house.' A quarter of a mile from the house we turned and went across the railroad. Ed Hicks and Frank Moore, we all went across about a quarter of a mile from the McCoy house, crossing the railroad. I saw Frank Hicks make the shots. He squatted that way, took aim and made two shots."

"What did he say?"

"I did not hear Moore say anything. Ed Hicks was across the road over in the field twenty-five or thirty yards from the fellow that shot. Don't know where Sweat Coleman was, but he was in the gang somewhere. Joe Knox was on the side of railroad fifteen or twenty yards from Hicks. Don't know where Paul Hall was. After Hicks made the first shot he took out his gun and reloaded it, and some one in the gang told him not to shoot. Then he made a second shot. Said, 'I would have got that guy if it had not been for the horse.' There was a horse between these gentlemen and Hicks. After that we went on across. All split up after the two shots were made, some on one side of railroad and some on east side."

Cross-examination.

"Think it was about a mile from McCoy's house where the shooting was done. I have been indicted for murder in the first degree. I told somebody this story before I went on the stand. Talked about it around here. I don't know who told Hicks not to shoot. Never was before the grand jury. I gave my testimony in a room with six or seven men there. I did not expect to kill anybody when I went into the lodge. Did not join for the purpose of killing anybody.

Never made up my mind to kill anybody, don't know when fellows made up their minds to kill anybody. Didn't see Sweat Coleman give Hicks a gun. Didn't come here to organize a lodge for killing people. Didn't find out that anybody was to be killed. I heard this Hill say there was going to be trouble, but heard nothing said about killing anybody. Have not heard anybody else say there was going to be trouble except Hill, and heard no talk about killing anybody that morning" (Record, pp. 31–39 inc.).

It is to be observed that the defendant in the indictment is Ed Hicks, not Frank Hicks who is said to have made the shots (Record, p. 26).

The next witness, WALTER WARD, knew the defendants belonged to the Union.

"They took guns when they went to the Union. Heard leaders say they were looking for trouble. Ed Hicks was one and Hill was one. Told me Knox was vice-president. Paul Hall woke me up on Wednesday morning about 4.30 and told me to go to Ed Hicks's house. I told him I was sick, and he told me I had got to go, and to get my gun. I said it was over at old man Keys's, and he said to go if I hadn't no gun. Told me to go to Frank Moore's house. I did not take a gun. Frank Moore gave me a 32 Smith & Wesson. Did not tell me anything until the shooting at Hoop Spur and then hollered 'Come on.' Frank Moore and Coleman were present."

"Where was Knox?"

"Knox was there somewhere, could not tell where. So was Paul Hall, but could not tell where. During the morning did not hear Paul Hall say anything. Heard Frank Moore tell some one that there had been a man killed at Hoop Spur, and said he wanted us to go up there. Did not say why. If they found a man picking cotton in the field, that is where they are going to kill him, right there. Sweat was working his gun around. All he said was, 'I have got a 45–70.' Sweat did not say what he was going to do with it. We went down across the field, Paul Hall in field on

one side of railroad, Coleman on other side, Knox up on the railroad. Frank Moore was sitting down close to Frank Hicks, who made two shots up the road toward Dr. Richardson's house, right up the road. He shot north" (Record, pp. 40–43).

Cross-examination.

"I did not have any gun. I was told to go to Ed Hicks's house and wake up all on the road. No one went with me. I went because I was scared to go to white folks. I have been indicted with the bunch for some kind of murder, the killing of Clinton Lee. I did not shoot at him or tell anybody else to shoot at him, or have any agreement that he or anybody else should be killed. There was no trouble on hand when Hill spoke. Never heard any members of the defendants or anybody else say that anybody was to be killed. Nobody told Frank Hicks to shoot that gun. George Green told him not to shoot. I ran. Started to run and they said: 'Stop! Where in hell are you niggers going?' We stopped. Some of us lay down in the woods, some of us got behind the stumps until Frank Moore said, 'Let's go.' So far as I know the defendants have not done anything to anybody. Went on across Craig's field and went back on the place. Knox was with me. We were getting out of trouble. Stayed there until Friday and then came on up to Elaine and give up to Mr. Cazort. They told us niggers to come out of the bushes and stop cutting the fool. I hadn't been doing anything, but I was scared to go where the white folks was at. I hadn't done a thing. Don't know as these other fellows made a shot. I woke up the president and told him Frank Moore sent for us to meet over to Frank Moore's house. Don't know who told us to stop running."

"You thought they were going to shoot you?"

"I know they were if I had kept going" (Record, pp. 43–45 inc.).

DAVE ARCHER.

"My name is Dave Archer. Do not belong to the Union. Know Paul Hall, Frank Moore, Ed Hicks, Sweat Coleman

and J. E. Knox. On Wednesday morning when the trouble happened I was in the alfalfa patch right behind my house. About ten o'clock Ed Hicks sent out some men after the fellows that didn't belong to the Union to capture them, and they captured me. Carried me over and put me in Ed Hicks' squad over at Paul Hall's house. I stayed there about an hour before I got away. Hicks was pointing out the way for us men to go to watch for the white people. He said they was going to kill the white people when they come down there. That is what Hicks told the men. He told the negroes to do that. I went down in the slough with them, and when we got down in the slough why I laid my weapon down and I says I will be back directly. I says, 'You watch until I come back,' and I went on down in the slough and got in the field the way they carried me; and I went on down to Elaine, and before I got to Elaine the white people was coming up there. I live on Mr. Stokes' place. I went on down to Elaine and told them about they had me and I got away; I got Mr. Slayton to bring me back to his house. I have not been arrested. Ed Hicks took charge of me. I saw Frank Moore at his house, they first carried me to Frank's house."

"Did you hear Frank make a speech?"

"Yes, he said he was going to do the same thing he was telling his men. He was going to kill all the white people that come down there that evening. Did not see Preacher Knox. Saw Sweat Coleman at his house. They carried me right through his yard. Didn't hear him say anything. He was setting on the gallery. He hollered and said, 'Hello, they have got you.' I saw Paul at his house. They carried me over to Frank's, and over to Paul's house. Escorted me from one house to the other. I left when that fellow Hicks told them all to get in the slough. I saw Paul Hall had a Winchester. He said he was watching for the white folks. Ed Hicks and Frank Moore did most of the talking. I didn't hear Sweat say anything, they didn't let me say anything to Sweat. Didn't hear Knox say anything" (Record, pp. 45–47).

Cross-examination.

"I have been with Mr. Stokes at Elaine three years, came from Modoc. Lived there about thirteen or fourteen years with Mr. Jim Harden. When I come from Mississippi over here to Modoc he was there, and I don't know how long that has been. My father-in-law is Alex. Brown. I told Mr. Stokes just as soon as I got away. I told him who carried me over there, the three men, one was named Smith, but the other two boys, Dr. Cruise told me they was named Foster, but they was strangers to me. The army man carried me. They made me get my gun. Double-barrel shotgun, not loaded. I didn't say anything. I was scared, was studying how to get away. Very badly frightened. I took good notice of what the boss men said. They were Hicks and Moore. Didn't hear Knox say anything. Don't know whether he did anything. Never saw his gun. That's all I know, no more than what they done to me" (Record, pp. 47–48).

J. GRAHAM BURKE.

"Know Sweat Coleman, J. E. Knox, Ed Hicks. Don't know Paul Hall. Mr. Mosby and myself had a conversation with them. It was an investigation we were making at that time. Conversation in County Judge's office downstairs. I was not undertaking to commit these people to jail, or acting as a judge. We sent for them. They were in jail. We sent for them and brought them out there. Warrants had been issued for them, but at that time there was no way of getting them tried. I do not know that we advised these men that anything they said would be likely to be used against them. We just merely asked them questions and they either denied them or admitted them. They were not put on notice that we were making any investigation to ascertain whether they were criminally responsible. I knew they were under arrest, and had them brought in by an officer who was present. No coercion was used in talking to these negroes. If anybody made promises of reward I do

not know it. I didn't. The statements were made voluntarily to me or in my presence, and no tactics were indulged in to cause them to make any statements through fear at that time or at any other time. They were not handcuffed" (Record, pp. 49-50).

Asked whether there was any coercion used at any time before they were brought before him replied:

"Not that I know of, Judge Moore. There wasn't any used in my presence."

"Mr. Mosby or myself asked him if he was a member of the Union (Sweat Coleman) and he admitted that he was, and we asked him when he received knowledge of the fact that there had been a man killed at Hoop Spur. Admitted that he found it out the next morning, that he was either at Frank Moore's or Paul Hall's house, and that they ganged up there and after the shooting up at Hoop Spur they went up there with the gang. I don't recall what kind of a gun he said he had, I remember he made the statement that he had a gun, but I don't remember what kind. He made the statement that whoever it was, I have forgotten now who he said notified him, but in any way he went up to Frank Moore's or Paul Hall's house and they set around there, and different ones of them ganged around there until eleven or twelve o'clock when the shooting happened at Hoop Spur—the gang organized and went towards Dr. Richardson's place, and when they got up to the railroad track Sweat told about these two shots being fired. I don't recall now whether he told who it was that made the shots, but there was two shots made there he said, and they split up there and went on each side of the railroad, on which side of the track Sweat was I don't remember what he said about that, whether he said he went towards Yellow Banks or on the other side of the railroad. He was up there and said these two shots were made. Knox's statement was practically the same as Sweat's so far as that point is concerned; that he went up there with the gang, that he got with them and went up towards Dr. Richardson's. Don't recall where he said he was when

these shots were made. Admitted he went up there with gang. Ed Hicks' statement was about the same, that he was in the gang that went towards Mr. McCoy's house; and after he got up there these shots were fired; that he took a gang of negroes and went on one side of the railroad—seems that the crowd split there, part followed Frank Moore and some went with him and went back toward Yellow Banks, but he admitted being in the gang that went up there" (Record, pp. 49–51 inc.).

At the close of this testimony the State rested. The defendants' counsel offered no testimony. So far as the record shows, no argument was made, and as the case took less than an hour, including the charge, it is clear that there was no time for any real argument.

From this evidence it appears first that neither of the defendants did any shooting, and they were convicted upon evidence that they were present when the shots were fired. It was a morning when the community was greatly excited and Negroes were being shot indiscriminately. A party of them gathered together, as they naturally would, but there is nothing to indicate that they did it with the purpose of attacking anybody, or of doing more than defending themselves. There was no evidence that there was any plan to capture Elaine or to kill white people, as was stated to be the fact by Mr. Allen in the public prints. If there had been, it would have been produced at the trial. There was no evidence of any illegal purpose on the part of the organization, although it was stated that there was abundant literature to show it, and a list of the persons who were to be killed, but none of these papers and no evidence of that kind was offered to the jury. There was no evidence of any conspiracy or intent to kill anybody. The nearest approach to it was a statement that one Hill who seems to have been, according to the statement of Allen, a swindler aiming to get money from the Negroes told them that there might be trouble.

There was evidence that a party not charged in the indictment fired two shots from a place at least half a mile away from the place where Lee was killed. It may or may not have come from the rifle of this person, but there was no evidence that the man who fired the shots had any purpose of killing anybody before he fired the shots, and not a particle of evidence that there was any conspiracy or combination to kill, or that any of the other persons there sympathized with his action. The only evidence on that point is that some one urged him not to fire another shot. So far as one or two of the defendants are concerned, there is hardly any evidence more than that they were in the crowd, and yet the jury convicted them of murder in the first degree, punishable by death, which was defined in the judge's charge as murder done with malice aforethought, with premeditation and deliberation, and with a specific intent to take human life at the time the shot was fired (Record, p. 52).

The evidence produced at the trial may be searched without finding anything to warrant the verdict which was rendered.

The Charge to the Jury.

Thereupon the jury were charged orally very briefly. The charge in substance defined the various degrees of murder, and contained the statement that

> "malice shall be implied when no considerable provocation appears, or when all the circumstances of the act manifests an abandoned or wicked disposition. The killing being proven, the burden of proving circumstances of mitigation that justifies or excuses the homicide shall devolve upon the accused, unless by the proof upon the part of the prosecution it is sufficiently manifest that the offence amounted only to manslaughter, or that the accused was justified or excused in committing the homicide."

The court then instructed the jury that the defendants were charged in the indictment with murder in the first degree as principals under the section of the statute which reads as follows: "One who aids, assists, abets, advises or encourages shall be deemed in law a principal, and be punished accordingly." He proceeded: "So if you find from the evidence in the case that the defendants were present at the time that Clinton Lee was killed, and that they, or either of them, aided, assisted, abetted, advised or encouraged the commission of the offense, and were present at the time the offense was committed, then you will find them guilty as charged in the indictment, and the punishment is the same as the principal."

The court instructed them as to what a reasonable doubt was and to give the defendants the benefit of that doubt; also as to the law which enabled them to fix the penalty of death or imprisonment if defendants were guilty of murder in first degree, and that they could find one of the defendants guilty in the first degree, and one guilty in the second degree, or some of them not guilty.

He instructed the jury "that the State was required to prove all the material allegations in this indictment and prove them beyond a reasonable doubt; that it was not a mere possible or imaginary doubt, but such a doubt as would cause a prudent man to pause or hestitate in the graver transactions of life, and a juror is satisfied beyond a reasonable doubt if from a fair and candid consideration of all the evidence he has an abiding conviction of the truth of the charge" (Record, pp. 51–54).

There was no discussion of what the evidence was, and nothing to call the jury's attention to the fact that something more than mere presence when a crime is committed is necessary to make a person a participant in the crime, nothing which would indicate to the jury that there was really any question as to the guilt of the accused. It was purely a formal charge. The jury were out less than five

minutes and returned a verdict of guilty of murder in the first degree against all the defendants. The defendants excepted to the verdict and to the instructions given to the jury by the court, and after that the counsel appointed by the court, who were Messrs. J. I. Moore and Greenfield Quarles, seem to have done nothing more.

On the 11th of November the defendants were sentenced to death by electrocution on the 27th December, 1919.

Motion for New Trial.

A motion for a new trial was made on the 20th of December (Record, pp. 57–60) which was overruled, and the defendants, represented now by new attorneys, Messrs. Murphy, McHaney and Scipio Jones, appealed on the same day (Record, p. 63).

The grounds urged in the motion were the state of public feeling against the defendants, the fact that the defendants and witnesses were frequently subjected to torture for the purpose of extracting from them admissions of guilt and to make them testify against the defendants; that they were given no opportunity to consult with their friends and seek assistance, or informed of the charge against them until after their indictment; that they were carried from jail to the courtroom without having been permitted to see or talk with an attorney or any other person in regard to their defense; that the court appointed counsel for the defendants without consulting them, or giving them an opportunity to employ their own counsel; that the state of public feeling was such that they could not have a fair jury; that the trial proceeded without their consulting with their counsel or any witnesses, or being given an opportunity to obtain witnesses; that they were never in court before and were entirely ignorant of what they could do to defend themselves; that the trial from beginning to end occupied three-fourths of an hour and the verdict was

returned in from three to six minutes. Four of the defendants say that they never had a copy of the indictment served upon them, one had it only forty-eight hours before the trial (Record, pp. 57, 58).

Another ground was that under the practice which prevailed in the State only white men were summoned to sit on the grand jury or the jury, and that by this discrimination the defendants were deprived of their rights under the Constitution of the United States; that they had no notice or knowledge of what steps they should take to raise this point before the trial; that the verdict is contrary to the law and evidence (Record, pp. 58, 59).

To this motion are attached two affidavits, one of Alf Banks, Jr., and another of William Wordlaw who testified to the fact that they were whipped, placed in the electric chair and strangled by something put in their noses to make them testify. These defendants did not suffer from what was done to these witnesses, as they did not testify at their trial, but their affidavits confirm the testimony of the others as to the treatment to which the Negroes in confinement were exposed (Record, pp. 60–62 inc.).

The State Supreme Court's Opinion.

On appeal the case was argued in the Supreme Court of Arkansas on the 22d of March (Record, pp. 63, 64). On March 29th the court overruled the motion in an opinion found in the record (pages 64–67 inc.).

In this opinion on page 65 the court state that according to the affidavits filed in support of the motion the defendants were members of the organization known as the Farmers Progressive Household Union of America, who held meetings from time to time for the lawful purpose of promoting the financial interests of its members; that while one of these meetings was in progress an automobile containing two white men and one Negro passed along the

public road and stopped some forty or fifty yards away from the building, "whereupon the pickets fired into the car and killed one of the men in it."

There was no testimony of this sort at the trial in this case, as the record shows, and the attitude of the court toward the case may be inferred from the fact that this statement appears in the opinion.

The court proceeds then to comment on the fact that a number of the lodge members assembled about the houses of the appellants about a mile from Elaine where the shooting had occurred, practically all were armed, and Moore made the statement that they would kill all the white people who came there, but this was explained by saying that they gathered to defend themselves against attack. Then the court states that on hearing firing they proceeded to march toward Elaine, "Moore having said that some of their members were being attacked and they would go and help them fight" (Record, p. 66). This goes beyond the testimony given at the trial (Record, pp. 39, 40, 48, 49, 54, 55), and especially in changing Moore's alleged statement from a declaration of what "he" intended to do to a statement of what "they" intended to do.

The opinion comments on the fact that when Hicks said he would shoot, one member of his party told him not "to do so, but no one made any attempt to restrain him," and after the shooting the party dispersed.

This certainly, even as stated by the court, is no evidence that the defendants, no one of whom had fired a shot, was guilty of murder in the first degree.

The court proceeds to say that defendants now insist that "because of the incidents developed at the trial and those recited in the motions for new trials no fair trial was had or could have been had," and that the trial did not constitute due process of law, and then says:

> "It is admitted however that eminent counsel was appointed to defend appellants, and no attempt was made to

show that a fair and impartial trial was not had except as an inference from the facts stated above, the insistence being that a fair trial was impossible under the circumstances stated.

"We are unable to say that this must necessarily have been the case. The trials were had according to law, the jury was correctly charged as to the law of the case, and the testimony is legally sufficient to support the verdict returned. We cannot therefore in the face of this assume that the trial was an empty ceremony conducted for the purpose only of appearing to comply with the requirements of law when they were not in fact being complied with" (Record, p. 66).

The opinion concludes:

"We have given these cases the careful consideration which their importance required, but our consideration is necessarily limited to those matters which are properly brought before us for review, and as no error has been made to appear in either case the judgments must be affirmed."

The court in dealing with the case treats the allegation in the motion for a new trial that the witnesses were tortured to make them testify against the defendants, and all the other allegations which show that at the trial the court was surrounded by a mob determined on a verdict of guilty, as incidents, and say that they cannot say that a fair trial was "*necessarily*" impossible.

It is difficult to conceive the state of mind of the court which would lead it to say that the torture of witnesses to make them give false testimony does not effect the fairness of the trial, but the thing which distinguishes this case from the *Frank* case is that the Supreme Court of Arkansas did not pass on the question whether the allegations in the motion for a new trial of violence, prejudice, torture and mob pressure on the jury were true or not. The court assumed that they were true, and said it did not follow from them that the trial was *necessarily* unfair.

This is in substance saying that the defendants must actually prove that the jury were influenced, must prove that the trial was unfair, whereas the well-established rule of law is that where circumstances like this are proved, the trial cannot stand unless it is affirmatively proved that it was fair, and the court will not admit such proof.

The rule has always been as stated in *Allen* v. *United States*, 150 U. S. 551, where speaking of a passage in the charge of the judge "as the mistake *might have* prejudiced the jury, it was error."

See also *Bucklin* v. *United States*, 159 U. S. 682, at 686, 687, where of a mistaken charge the court said, "This tended to coerce the jury into making a verdict," and "as this error may have injuriously affected the rights of the accused, the judgment is reversed."

Carver v. *United States*, 160 U. S. 553, where the admission of incompetent evidence "may have had so important a bearing that its admission must be regarded as prejudicial error."

Brown v. *Cummings*, 7 Allen, 507, 509, where speaking of evidence improperly admitted the court say, "Although this evidence was not noticed by counsel on either side in addressing the jury, or by the court in instructing them, yet it is impossible to know that it had no effect upon their verdict," and therefore the verdict was set aside.

See also *Maguire* v. *Middlesex Railroad Company*, 115 Mass. 239, at page 241.

These cases state the true rule, and that rule was ignored by the Supreme Court of Arkansas, which was content to deny a new trial and send these defendants to their death without even considering whether the allegations contained in the motion were true or not.

We contend that this opinion of the court shows what the feeling in the State was, and how indifferent the court was to the rights of the defendants. There was no finding

that the facts as to the treatment of witnesses and the pressure from the mob were not true. The suggestion that from the presence of the defendants when Hicks killed Lee an inference might be drawn that they aided, abetted or assisted him in doing so is certainly a very forced inference, and goes far beyond any interpretation of the evidence which would make these defendants beyond a reasonable doubt guilty of murder with malice aforethought, the most serious crime known to the law. No member of this court or any court would feel, if he were charged with crime, that proceedings such as those taken in this case gave him a fair trial.

As to some of the defendants there is hardly evidence to show that they were there.

The court was asked to rehear this case by a motion filed April 14, 1920 (Record, pp. 69, 70), which points out that the assumption of the court that the petition as to the composition of the grand jury came too late could not be supported, because it was presented at the earliest possible opportunity; that the statement of the court, that certain facts were alleged in the affidavits supporting the motion for a new trial, was also unwarranted because nothing was said on the point in question either in the motion for a new trial or in affidavits supporting them.

The motion for a rehearing makes a strong appeal supported by the facts, but it was overruled on the 26th April 1920 without any statement of reasons or any finding as to the facts (Record, pp. 68–70 inc.).

Subsequently an application was made to the Chancery Court for an injunction to restrain the sheriff from executing the prisoners and the injunction was granted, but the Chancery Court suspended its operation pending a decision by the Supreme Court of Arkansas as to whether it had jurisdiction, and after a hearing that court decided that the Chancery Court was without jurisdiction (Record, pp. 79–86 both inc.; see p. 83).

It may be noted in passing that in the opinion of the Supreme Court in this case the court said that no exceptions were taken at the trial (p. 81), the language of the court being, "There were no exceptions saved during the progress of the trials, but the records show that counsel for the accused cross-examined all of the State's witnesses at length" (Record, p. 81), a statement which the record hardly sustains.

Both opinions of the Supreme Court show that the allegations of facts in the petition for *habeas corpus* were urged upon it and in neither case did the court deal with these allegations or find that they were not true.

THE LAW.

The case which is presented to the court may be summed up as follows: A condition of things apparently existed in Phillips County, Arkansas, which culminated in an attempt by white men to break up a meeting of Negroes in the course of which one white man was killed, but whether by his own party or by Negroes there is nothing to show. The consequence was a state of great excitement, in the course of which inflammatory statements were made alleging that there was a deliberate purpose on the part of the Negroes to attack and kill their white neighbors, which was readily believed though on its face it is absurd. The whites assembled, shot and killed the Negroes indiscriminately to a very large extent, and tried to lynch those that were arrested, but better counsels prevailed, and they were persuaded to abandon this purpose by an assurance given by leading citizens that the accused men should be dealt with according to law, that "justice would be done and the majesty of the law upheld." The state of public opinion is shown by the statements that were printed in the newspapers, by the resolutions of various bodies, commercial and otherwise, and it is perfectly clear that the community demanded the conviction and execution of those

who were accused, and that nothing short of an assured equivalent for lynching would have prevented the mob from killing the prisoners.

The trial was in every respect unfair, the time occupied and the character of the evidence show how little effort was made to really determine the merits of the case. The public demanded victims, and the public demand overawed the courts with the result that these helpless and ignorant Negroes were convicted with a view to their prompt execution. Nowhere in the history of the case from beginning to end is there any indication that prior to the conviction there was any serious attempt made to ascertain whether the defendants were really guilty. The evidence on which they were convicted was manufactured, the witnesses were beaten and terrorized, and the record of the whole case shows what, if consummated, is only judicial murder.

The leading case on the subject is the case of *Frank* v. *Mangum*, 237 U. S. 309. In that case the law is laid down clearly in both the majority and minority opinions of the court.

In the majority opinion the statement is made that "the due process of law guaranteed by the Fourteenth Amendment has regard to substance of right, and not to matters of form or procedure; that it is open to the courts of the United States upon an application for a writ of *habeas corpus* to look beyond and inquire into the very substance of the matter, to the extent of deciding whether the prisoner has been deprived of his liberty without due process of law, and for this purpose to inquire into jurisdictional facts, whether they appear upon the record or not; that an investigation into the case of a prisoner held in custody by a State on conviction of a criminal offense must take into consideration the entire course of proceedings in the courts of the State, and not merely a single step in those proceedings."

"There is no doubt of the jurisdiction to issue the writ

of *habeas corpus*" and "it was the duty of the court to refuse the writ if it appeared from the petition itself that the appellant was not entitled to it."

"Now the obligation resting upon us, as upon the District Court, to look through the form and into the very heart and substance of the matter, applies as well to the averments of the petition as to the proceedings which the petitioner attacks. We must regard not any single clause or paragraph, but the entire petition, and the exhibits that are made a part of it."

Later the court rejects "the suggestion that even the questions of fact bearing upon the jurisdiction of the trial court could be conclusively determined against the prisoner by the decision of the state court of last resort."

And then follows: "We of course agree that if a trial is in fact dominated by a mob, so that the jury is intimidated and the trial judge yields, and so that there is an actual interference with the course of justice, there is in that court a departure from due process of law in the proper sense of that term. And if the State, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the State deprives the accused of his life or liberty without due process of law."

And they further say, "We are very far from intimating that manifestations of public sentiment, or any other form of disorder, calculated to influence court or jury, are matters to be lightly treated."

In the minority opinion we find the succinct statement that "*habeas corpus* cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell. Whatever disagreement there may be as to the scope of the phrase 'due process of law,' there can be no doubt that it embraces

the fundamental conception of a fair trial, with opportunity to be heard. Mob law does not become due process of law by securing the assent of a terrorized jury. We are not speaking of mere disorder, or mere irregularities in procedure, but of a case where the processes of justice are actually subverted." Followed by the later statement: "When the decision of the question of fact is so interwoven with the decision of the question of constitutional right that the one necessarily involves the other, the Federal court must examine the facts."

As an illustration of what the court calls an extreme case we find in the minority opinion this statement: "If the trial and the later hearing before the Supreme Court had taken place in the presence of an armed force known to be ready to shoot if the result was not the one desired, we do not suppose that this court would allow itself to be silenced by the suggestion that the record showed no flaw." And the conclusion is that "supposing the alleged facts to be true, we are of opinion that if they were before the Supreme Court it sanctioned a situation upon which the Courts of the United States should act, and if for any reason they were not before the Supreme Court, it is our duty to act upon them now and to declare lynch law as little valid when practiced by a regularly drawn jury as when administered by one elected by a mob intent on death."

In Frank's case he had a trial which lasted for four weeks, in which he had the assistance of several attorneys. The ground for *habeas corpus* was the fact of alleged disorder in and about the courtroom, including manifestations of public sentiment hostile to the defendant sufficient to influence the jury. It was stated that the defendant was not in the courtroom when the verdict was rendered, his presence having been waived by his counsel. The question of whether there was disorder was heard by the trial court and afterward by the Supreme Court of Georgia on evidence, and the finding was that the trial court was war-

ranted in finding that only two of the alleged manifestations occurred within the hearing or knowledge of the jury,—(1) laughter by spectators while the defense was examining one of its witnesses, and (2) applause by the spectators during a colloquy between the solicitor general and counsel for the accused,—whereupon, the defendant's counsel complaining, the court directed that order should be maintained.

The Appellate Court ruled that the action of the trial court was a manifestation of the judicial disapproval, and a sufficient cure for any possible harmful effect of the irregularity, and it was deemed sufficient by the counsel, who made no request for further action by the court.

Further complaint was that there was an indication of popular approval of a verdict of guilty while the jury was being polled, which was done after the jury had reached their verdict and were merely reaffirming it by individual declaration.

The *Frank* case was absolutely different from the case which is presented here. It is hard to say that the absence of a prisoner at a time when a verdict is rendered invalidates the trial, especially when it is consented to by counsel, for it is in reality a mere form, and the effect of such absence may well be left to be dealt with by the State where the trial is held. Nor are expressions of feeling by spectators during the trial of a case, if promptly repressed by the court, a reason for disregarding the verdict. The questions of fact which were raised in Frank's case were carefully considered by the Supreme Court of Georgia, and disposed of in accordance with the laws of that State, nor did they, in the opinion of the majority, show such mob control of the court as denied the defendant due process of law.

Very far different are the facts in this case. As against a trial lasting four weeks, and a defense by counsel heartily espousing the cause of their client, selected by him and conferring with him and giving him the opportunity to study his defense, we have a trial lasting about three-

quarters of an hour, held very shortly after the indictment, with no opportunity given the defendants to consult counsel, with no earnest defense, with no conference between clients and counsel, no opportunity to summon witnesses, no opportunity to take the stand in their own defense, none of the several rights which men on trial for their lives are entitled to be accorded in courts of justice.

We have the whole community inflamed against the defendants, prepared themselves to lynch them, only refraining from so doing because they are assured by leading citizens that the trial should accomplish the same purpose, a condition of things where no man who was on that jury and had ventured to vote for acquittal or delay could have lived in Phillips County, according to the testimony of one of the men who engaged in the business of manufacturing evidence for the State. We have false statements printed in the newspapers; we have society substantially organized to convict these people; and more than that, we have witnesses deliberately terrorized and forced on pain of death or torture to give false testimony. We have the testimony of the witnesses themselves that they were so terrorized and that their testimony was false. We have the testimony of the men who inflicted the torture; we have a mass of evidence which shows, if evidence can show anything, that the defendants never had a fair trial and in fact that they were innocent. As to some of them there is no evidence as to any act or word except that they were with a gang of Negroes assembled to all appearances for self-defense.

We have distinct evidence that all Negroes at that time were in danger of their lives, and that two or three hundred men were killed. What would be expected of human beings in circumstances like that? Can we ask that they lie down and be killed without any attempt to assemble for their own protection. The courts of Georgia had not before them all the evidence which was presented to the District

Court of the United States, and the questions which we ask this court to consider were never considered by those courts. The allegations of fact were never considered by the Supreme Court of Arkansas as they were by the Supreme Court of Georgia in the *Frank* case, but the opinions apparently assume that they were true. This distinction between the cases is vital.

The statement in the opinion in reply to the claim that a fair trial was impossible was, "We are unable however to say that this must *necessarily* have been the case." No one dealing with the operation of another man's mind can undertake to say what motives *necessarily* influence him, but all judicial action is founded upon the constant assumption that certain influences will produce certain results on human action. There can be no question that the citizens of Helena were determined that these men should be convicted, and that they manufactured the evidence for the purpose; and for the court to say that it cannot assume that the accused *necessarily* did not have a fair trial shows clearly that the Supreme Court of Arkansas was itself influenced by the same feeling that influenced the leaders of society throughout the region where these tragedies occurred.

If this Court on reading this petition, these affidavits and this record is not satisfied that if there ever was a case in which *habeas corpus* should be granted this is the case, no argument of counsel will convince them, and we submit with confidence that either *habeas corpus* should be granted in this case or *habeas corpus* is not a practical remedy for such outrages as the evidence in this case discloses. This is in fact the extreme case which the minority of this court used as an illustration in the *Frank* case.

JURISDICTION OF THE STATE SUPREME COURT.

As bearing on the effect of the decision by the Supreme Court of Arkansas on the rights of the petitioners, attention is called to the narrow scope of that court's jurisdiction in criminal cases, as defined in § 3413 of Crawford & Moses's Digest of the Statutes of Arkansas:

> "A judgment of conviction shall only be reversed for the following errors of law to the defendant's prejudice appearing upon record:
>
> "*First.* An error of the circuit court in admitting or rejecting important evidence.
>
> "*Second.* An error in instructing, or in refusing to instruct, the jury.
>
> "*Third.* An error in failing to arrest the judgment.
>
> "*Fourth.* An error in allowing or disallowing a peremptory challenge.
>
> "*Fifth.* An error in overruling a motion for a new trial."

The Supreme Court, that is to say, cannot reverse the findings of the Circuit Court upon any question of fact, but can set aside a conviction only if some ruling of the Circuit Court was wrong as matter of law. In the case at bar, the question whether the circumstances surrounding the trial were such as to render impossible a righteous verdict was primarily a question of fact. Hence the Supreme Court could not, without exceeding its jurisdiction, reverse the action of the circuit court in refusing a new trial.

This is equivalent to saying that, under the laws of Arkansas, the only court that had jurisdiction to pass on the fundamental issues raised by the motion for a new trial was the Circuit Court of Phillips County, presided over by the judge before whom the trial had taken place; (Constitution of Arkansas, Art. VII, § 13: "The state shall be divided into convenient circuits, each circuit to be made

up of contiguous counties, for each of which circuits a judge shall be elected"; Crawford & Moses's Digest § 2206: "Until otherwise provided by the general assembly the judicial circuits shall be composed of the following counties: *First*, White, Woodruff, St. Francis, Lee, Phillips. *Second*, Greene, Craighead," etc.), and upon an application made at the same term at which the judgment was rendered (Crawford & Moses's Digest, § 3218: "The application for a new trial [in a criminal case] must be made at the same term at which the verdict is rendered, unless the judgment is postponed to another term, in which case it may be made at any time before judgment"). In the case at bar, as will be remembered, there was no postponement of judgment, everything possible being done to hasten the final disposition of the case.

The theory of the decision in *Frank* v. *Mangum*, 237 U. S. 309, is that, in a situation like that now presented, a State cannot be said to have deprived an accused person of life or liberty without due process of law if it has provided an independent tribunal for the examination of his complaint and this tribunal, sitting in an atmosphere free from the alleged disturbing elements, has held the complaint unfounded. Arkansas, as has just been shown, has made no provision of this kind.

It would be preposterous to say that the requirements of the Fourteenth Amendment are satisfied by giving one seeking a new trial because the court in which he was tried was guilty of the grossest irregularities nothing but the empty right to have the facts upon which his application is based passed upon by the very judge whose conduct is complained of, and that, too, only at a time when the adverse influences, if they ever existed at all, must still be operative with all their force.

THE EXCLUSION OF NEGROES FROM THE JURIES.

The fact that no Negroes were summoned to serve on either the grand or the petit jury, if taken in time should have led the court to quash the indictment.

Ware v. *State*, 146 Ark. 321.

The omission to make the point in time was the fault of the counsel appointed by the court.

MOORFIELD STOREY,
Counsel for the Appellants.

FILED
JAN 8 1923
WM. R. STANSB
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In the Supreme Court of the United States

[redacted]

(198 and 199, October Term, 1922.)

FRANK MOORE, ED HICKS, J. E. KNOX, ET AL. ..... *Appellants*

vs.

E. H. DEMPSEY, Keeper of the Arkansas State Penitentiary ..... *Appellee*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS

ABSTRACT AND BRIEF FOR APPELLEE

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In the Supreme Court of the United States

OCTOBER TERM, 1921.

No. 595.

(198 and 199, October Term, 1922.)

FRANK MOORE, ED HICKS, J. E. KNOX, ET AL. ..... *Appellants*

vs.

E. H. DEMPSEY, Keeper of the Arkansas State Penitentiary ..... *Appellee*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS

ABSTRACT AND BRIEF FOR APPELLEE

EXPLANATORY STATEMENT

The appellee has not been favored with any abstract or brief on behalf of the appellants, hence the question of just what we should say as to abstract has given us some concern. Being somewhat unfamiliar with the

practice in this court, counsel for appellee is relying upon the spirit of fairness and liberality which has always characterized this Court for indulgence, if, under these circumstances, our brief does not comply strictly with the rules. Assuming that it is proper, in the absence of a statement of the case on the part of appellant, as provided in rule 21, to make an abstract of the record, we proceed to do so before writing the brief.

ABSTRACT.

The court will observe that there are two of these cases but as they involve the same questions and the same evidence, stipulation of counsel has been made a part of the record that both causes may be submitted to this court upon the printed record in the case of Frank Moore, Ed Hicks, J. E. Knox, Ed Coleman and Paul Hall, Appellants, vs. E. H. Dempsey, Keeper of the Arkansas State Penitentiary, Appellee, and that these causes may be consolidated and submitted together upon one printed record (Tr., p. 106).

Appellants filed in the District Court of the United States for the Western Division of the Eastern District

State of Arkansas their petition for writ of habeas corpus against appellee alleging that they are citizens and residents of the State of Arkansas and confined in the Arkansas State Penitentiary, in the jurisdiction of the court; that appellee was Keeper of said penitentiary and as such was unlawfully restraining appellants of their liberty and would, unless prevented, deprive them of their lives in violation of the Constitution and laws of the United States and the State of Arkansas; that they are negroes and were arrested and placed in the jail of Phillips County, Arkansas, and until their trial were kept in confinement upon charge of murder in the first degree for the killing of one Clinton Lee; that said Lee was killed while a member of a posse of white men who were attempting to quell a race riot growing out of the killing of one Adkins at Hoop Spur in said county; that at the time of the killing of Lee, appellants and a large number of other members of their race were assembled in their church house at Hoop Spur with no unlawful purpose; that while they were thus assembled, white persons began firing guns or pistols from the out-

side into said church house, having come there in automobiles for the purpose of breaking up the meeting; that Adkins was killed either by members of his own party or by some other person unknown to appellants but that the posse sent word to Helena, the county seat, that Adkins had been killed by the negroes in cold blood while on a peaceable mission, which report caused great excitement in said county, which excitement spread into other counties and States; that, early the next day, a large number of white men armed themselvs and rushed to the scene of the trouble, same being the vicinity of Elaine, and began the indiscriminate killing of negroes; that highly inflammatory articles were published in the press referring to the incident as "race riot" and "uprising of the negroes" and "a deliberately planned insurrection among the negroes against the whites" of Elaine; that the officers of Phillips County called upon the Governor of the State and the Governor in turn called upon the commanding officer at Camp Pike for soldiers to assist in quelling the disturbance and a company of soldiers was dispatched to the scene of the

trouble who took charge of the situation and finally succeeded in stopping the slaughter.

It was further alleged in the petition that appellants and many others of their race were incarcerated in the jail at Helena on a charge of murder; that a Committee of Seven, composed of leading business men and officials, was selected for the purpose of probing into the situation and picking out those to be condemned to death and those to be sentenced to the penitentiary; that said Committee took charge and proceeded to have brought before them a large number of those incarcerated in jail and examined them regarding their own connection and the connection of others accused; that, if evidence unsatisfactory to said Committee was not given, they would be sent out to an adjoining room in the jail and tortured by beating and whipping and by being placed in an electric chair naked and having a current of electricity turned on to shock and frighten them into giving damaging statements; and that strangling drugs were put up their noses for the same purpose;

and that by these means false evidence was extorted to be used against appellants.

The petition further alleged that on every day from October 1st, 1919, until after their trial on the 3rd of November, 1919, the press carried inflammatory articles giving accounts of the trouble, which aroused bitter feeling aginst appellants and other members of their race, one of which articles was a statement from the above-mentioned Committee of Seven purporting to give the facts concerningg a "deliberately planned insurrection of the negroes against the whites," in which it was stated that the Union, of which appellants were members, was "established for the purpose of banding negroes together for the killing of white people," copy of said article being attached as exhibit "A" to the petition; that, shortly after appellants were placed in jail, a mob of hundreds of men marched to the jail and would have lynched appellants except for the interference of soldiers and the assurance of the officials that appellants would be executed according to law (Tr., pp. 1-3).

Petition further stated that, prior to October 1st, 1919, appellants were share-croppers; that nearly all the land in Phillips County was owned by white men and rented out to share-croppers: that for some years past there had grown up a system among the land owners of furnishing negro tenants supplies with which to make crops and that the system was calculated and did deprive the negro tenants of all their interest in said crops; that, in pursuance of said system, the land-owners refused to give their share-croppers an itemized statement of their indebtedness or to permit them to move or sell any part of their crops (Tr., p. 3) but that the landlords themselves disposed of said crops and gave the tenants no account but paid them only such amount as they wished; that, to protect themselves against this system, the negro farmers organized socities with a view of uniting their financial resources in moral and legal measures to overcome the same and that the land owners were bitterly opposed to such societies and sought to prevent their organization; that, on September 30th,

1919, appellants and other members of the Ratio Lodge near Elaine learned that some negro farmers had employed an attorney of Little Rock, Arkansas, to represent them in effecting a settlement with the land owners and would be at Elaine on the following day to meet all the parties concerned, perfect arrangements and learn of the facts, as far as possible, and they decided to hold a meeting with a view of seeing him while there and engaging his services as attorney to protect their interests and that, accordingly, they met that night at Hoop Spur church house, which resulted, as before set out, in the killing of Adkins and the breaking up of the meeting; that, on October 1st, 1919, the son and agent of the attorney which appellants proposed to employ arrived at Elaine for a consultation but was arrested and barely escaped being mobbed and was taken to the jail at Helena and imprisoned until the thirty-first day of the month when he was indicted on a charge of barratry and on that day was told by officials that he would be released but that he must leave secretely by

closed automobile and go to West Helena, four miles away, and take the train so as to avoid being mobbed, and that his departure was fixed by the judge of the Circuit Court who tried the cases of appellants.

The petition further alleged that the Circuit Court of Philips County convened October 27th, 1919, and that a Grand Jury was organized, composed wholly of white men one of whom was a member of the Committee of Seven and many of whom were in the posses above-mentioned; that, during the session of the Grand Jury appellants and many other prisoners were frequently taken before it in an effort to extract from them false testimony and that they were frequently whipped, beaten and tortured and that by these methods false testimony was secured against appellants; that, on October 29th, 1919, a joint indictment was returned against appellants accusing them wrongfully of the murder of Clinton Lee; that, on November 3rd, 1919, appellants were arraigned and an attorney appointed by the court to defend them and that they were not given an opportunity to employ

an attorney of their own choice and that the attorney appointed or them did not consult with them, did not take any steps to prepare for their defense and did not ask anything about their witnesses; that appellants were immediately placed on trial before a white jury and the trial closed on a hearing of the State's witnesses alone, and that the jury quickly returned a verdict of guilty of murder in the first degree and appellants were sentenced to death by electrocution for December 27th, 1919 (Tr., pp. 3-5).

The petition further alleged that the trial lasted only about an hour and that only two witnesses testified to anything to connect them in any way with the killing of Clinton Lee, said witnesses being Walter Ward and John Jefferson, both under indictment for the same offense, and that said testimony was procured as above described and was wholly false and not given voluntarily and given on promise of immunity and that said witnesses afterwards plead guilty of murder in the second degree and were sentenced to terms of imprisonment and

afterwards made affidavits showing the falsity of their testimony and the means of its acquisition, which affidavits were attached as exhibits "B" and "C", respectively, to said petition (Tr., p. 5).

A certified transcript of the proceedings in the Phillips Circuit Court, which tried the appellants as above described, was attached to said petition as exhibit "D".

Petition further alleged that large crowds of white people bent on the condemnation and death of the appellants thronged the corthouse and grounds all during the trial and that, on account of the publicity given the killing, and on account of the fact that appellants were negroes, and on account of the fact that the Judge, the Sheriff, the Clerk, and the jurors were all white men, and on account of race prejudice it was impossible for appellants to get a fair and impartial trial; that the attorney appointed to defend appellants knew that the prejudice against them was such that they could not get a fair trial yet he filed no petition for change of venue

nor request for them to prepare defense and did nothing to protect appellants' interest; that appellants did not get a fair trial, but that if they had been given an opportunity they would have employed counsel of their own choice and would have made a defense (Tr., pp. 5-6).

The petition further alleged that the feeling against appellants was such that it overawed the Judge, the jury and the attorney appointed to defend for appellants and that all were dominated by the mob spirit and that the court, although a court of original jurisdiction in felony cases, lost its jurisdiction by virtue of such mob domination and that the result was but an empty ceremony carried through in apparent form of law and that the verdict of the jury was a mob verdict and, therefore, the judgment against appellants is nullity (Tr., p. 6); that the entire trial, verdict and judgment against appellants had already really taken place before said Committee of Seven and that when court convened the program laid out by said Committee was carried through and that the verdict was a part of the prearranged

scheme and judgment of said committee (Tr., p. 7). Attached as exhibit "E" to the petition is what purports to be a letter from said Committee of Seven to the Governor of the State (Tr., p. 7).

Petition further alleged that it is the practice in Arkansas to select Jury Commissioners from the white race and that these Jury Commissioners select grand and petit jurors from the white race and that the Judges of the courts appointing said Jury Commissioners are white men and that all of this is discrimination against the negro race; that this has been the practice in Phillips County for more than thirty years although the negro population of said county greatly exceeds the white population, and that a large proportion of the negroes are possessed of the legal, moral and intellectual qualifications required for jurors; that the exclusion of said negroes from juries was intentional; that, under the laws of Arkansas, an objection to an indictment on the ground that it was found by a grand jury composed of white men must be made at the impaneling of the grand

jury and objection to the petit jury must be made before a plea is entered to the indictment; that appellants did not have an opportunity to register their objections in either instance (Tr., p. 7).

Petition further alleged that, after their conviction and sentence to death, the friends of appellants employed other counsel who filed a motion for a new trial, said motion being a part of exhibit "D" to the petition; that said motion was overruled and an appeal taken to the Supreme Court of the State of Arkansas, the highest court in said State, where, on March 29th, 1920, the judgment was affirmed, copy of the opinion being attached as exhibit "F" to the petition and being Hicks vs. State, 143 Ark., 158; that, thereafter, appellants applied to the Supreme Court of the United States for a writ of certiorari to the the Supreme Court of Arkansas, said application being denied October 11, 1920; that, in August, 1921, the Governor fixed September 23rd, 1921, as the date of execution (Tr., p. 8).

Petition further alleged that on October 19th, 1920, the local post of the American Legion at Helena, composed of 300 white ex-service men of Phillips County, passed a resolution calling on the Governor for the execution of appellants and protesting against the commutation of the death sentence, copy of said resolution being attached to the petition as exhibit "H": that the Rotary Club and the Lions Club, of Helena, both composed of leading business men, adopted similar resolutions, same being attached as exhibits "I" and "J", respectively, to the petition (Tr., p. 8).

The petition further alleged that the trials, convictions and reversals of the cases of others accused of participation in the killings growing out of the Elaine riot showed the existence of mob spirit (Tr., p. 9).

The petition further alleged that, on June 8th, 1921, they filed in the Chancery Court of Pulaski County petition for writ of habeas corpus setting out the matters and things stated in the instant petition, and that said writ was granted and hearing set for June 10th, 1921,

but that, on June 9th, 1921, the Attorney General for the State filed petition with the Supreme Court of Arkansas for writ of prohibition against the Chancellor and appellants, which writ was issued on June 20th, 1921, by the Supreme Court, prohibiting the Chancellor from hearing the cause and which writ, also, quashed the writ of habeas corpus theretofore issued by the Chancellor; that on August 4th, 1921, the Hon. Oliver Wendell Holmes, Associate Justice of the United States Supreme Court, denied the application of appellants for writ of error in the matter of said writ of prohibition (Tr., p. 10).

Petition contended that, by reason of these things, appellants were deprived of their rights in violation of Section 1 of the 14th Amendment to the Constitution of the United States and under the laws of the United States enacted in pursuance thereto, in that they were denied the equal protection of the law and were convicted without due process of law; prayer for writ of habeas

corpus for their discharge. The petition was verified (Tr., p. 10).

Exhibit "A" to the petition purports to be a copy of a statement published in a newspaper at Helena October 7th, 1919, by E. M. Allen, giving the names of seven citizens of Helena chosen to direct operations in putting down the insurrection and discovering and punishing the guilty parties and calling on all persons, both white and black, in possession of useful information to come forward and give it and that such action would be for the public safety and the informant's identity would not be revealed. The statement said that the Committee of Seven was composed of leading business men of Helena and that it had been authorized to carry on the investigation both by the municipal and county authorities. After setting out, on its own responsibility the above and the fact that Mr. Allen was President of the Business Men's League and, also, President of the National Association of Insurance Agents, the headquarters of which were in New York City, the newspa-

per then gives Mr. Allen's Statement in full as follows:

"The present trouble with the negroes in Phillips County is not a race riot. It is a deliberately planned insurrection of the negroes against the whites, directed by an organization known as the Progressive Farmers' and Household Union of America, established for the purpose of banding negroes together for the killing of white people. This 'union' was started by Robert L. Hill, a negro 26 years old, of Winchester, Arkansas, who saw in it an opportunity of making easy money. He had been a farmer all his life, but lately had been posing as a 'private detective doing work in this and all foreign countries.'

"He started his first 'union' work in April of this year. He organized the Ratio Lodge in May of this year. He chose Ratio because his mother happened to be living there. He told the darkies that he was an agent of the government and because the senators and representatives at Washington

were white men and in sympathy with white men of the South, it was impossible for the negroes to get in the army, and so the government had called into the rights that had been promised them for service existence this organization which would be supported by the government in defense of the negroes against the white people. He told them it was necessary for all members of the union to arm themselves in preparation for the day when they should be called upon to attack their white oppressors.

"The slogan of the organization is 'We battle for our rights.' The password of all the lodges was 'We have just begun.'

"He told them that those members who were unable to buy munitions would be supplied by the union from the government storehouse at Winchester.

"The purely mercenary side of all develops as follows: Negro men were charged $1.50 entrance fees and Negro women 50 cents. At the second or

third meeting he would bring Dr. V. E. Powell of Winchester with him, who purported to be the examining physician for the government in its work of registering the negroes in defense of their rights. A certificate was filled out and signed by Negro upon payment of fifty cents. This certificate was supposed to be a registration document. Those negroes who were possessed of funds in amounts from $5.00 to $25.00 were enrolled in an advanced section of the union upon payment of whatever sum he (Hill) could procure in excess of $5.00, a certificate was given, entitling the holder to attend the congresses of the 'union' at Winchester and speak on the floor of the meeting regarding any questions brought up, and to assist in keeping the Constitution of the United States from being questioned.

"Another form of extortion was to sell shares of $10.00 each to the negroes in a proposed building to be erected by the 'union' at Winchester. Hill would find out what negroes possessed thrift stamps

and Liberty Bonds and would issue a certificate stating that so many shares had been purchased at $10.00 per share, and all negroes buying shares in the amount of fifty dollars or more were told that their names would be engraved in the building. In other words, he had so planned his campaign that any negro possessing from fifty cents to fifty dollars was given an opportunity to invest in something connected with the 'union'.

"He then advised the members that the general attorney of the 'union' in Little Rock would for an additional consideration represent all the negroes in their settlements with the landlords during the ginning season. He went to several of the meetings with typewritten powers of attorney which he had signed by the negroes, collecting amounts from twenty-five dollars to fifty dollars each with the crop as security. He was very adroit in making use of certain circulars issued by the government and in distorting the purpose of the Arkansas Ware-

house and Ginners' Law to convince the Negroes that the United States government was endeavoring to correct evils which he alleged existed among the farmers.

"He further told the negroes that the plan for Secretary Lane to provide homesteads for the soldiers had been carried out where the white soldiers were concerned, but the negroes had been refused participation in it. We found where negro soldiers at Elaine had sold their discharge papers for sums ranging from fifty to one hundred dollars on the theory that such discharges entitled the holder to forty acres of government land. He produced maps of state lands in Elaine country (1,600) acres which he said could be bought for $200. This amount was raised at one meeting and paid to him in cash. This land was all described and certain negroes had designated which parts of the various farms (all in cultivation), they desired, to take over for themselves after the white people had been driven off.

"He urged all lodges to decide upon a plan of campaign when the day came to strike and designate the part to be played by every man. He told them the government was erecting at Winchester three huge storehouses where arms, ammunition and trained soldiers would be ready for instant use. On Wednesday morning after the first fight at Hoop Spur the negroes crossed the track and lay in the weeds all day waiting for Hill's army to materialize. They were within easy range of automobiles going to and from Hoop Spur all day and could easily have fired into them but they wished to wait for Hill's army in order to clean up in one fell swoop.

"The fight at Hoop Spur was unpremeditated as far as the negroes were concerned as they were organizing their forces Wednesday morning to attack and capture Elaine but when runners informed the leaders that white men were entering the woods at Hoop Spur they decided to go up and wipe

out the little gang that was reported to be there, before entering upon the more serious task of capturing Elaine. They underestimated the size of the force from Helena and the battle resulted.

"Every negro who joined these lodges was given to kill white people. Unquestionably the time for attack had been set but plans had not been entirely perfected and the shooting of the officers brought on the insurrection ahead of schedule.

"Another scheme used by Hill to obtain money was to appoint leading negroes, or several of them, in each lodge as private and foreign detectives—furnishing them large nickle-plated stars and a pair of nickle-plated handcuffs, for which they paid him $50.00 each.

"His meeting at Winchester in August was attended and addressed by white men. He simply played upon the ignorance and superstition of a race of children—most of whom neither read nor write.

"I have cross-examined and talked to at least one hundred prisoners at Elaine. They belong to different lodges in that section. The stories they tell are almost identical as to the promises and representations made by Hill. He even told them that probably some of the negroes would be called upon to die before 'equal rights' would be assured, but they must look upon themselves as crusaders and die if necessary to secure the freedom of the other members of their race.

"A remarkable thing about the developments is that some of the ringleaders were found to be the oldest and most reliable of the negroes whom we have known for the past fifteen years. He had made them believe that he had been intrusted with a sacred mission which had to be carried out regardless of consequences.

"All lodge meetings were required to maintain an armed outer guard of six sentinels. Hill's usual

expression was, 'Get your racks filled for the day to come.'

"As far as oppression is concerned, many of the negroes involved own mules, horses, cattle and automobiles and clear money every year on their crops, after expenses are paid." (Tr., pp. 12-14.)

Exhibit "B" to the petition was an affidavit of Walter Ward made in Lincoln County, Arkansas, on May 8th, 1921, on the State Convict Farm, saying that he was at that time serving a term on a plea for murder in the second degree for killing Clinton Lee and that he was not guilty and that he gave evidence against appellants under extortion about in the manner set out in appellant's petition but that he testified falsely (Tr., pp. 15-16).

Exhibit "B" to the petition also contained an affidavit of George Green who was then serving a term in the penitentiary. He says that he testified against appellants falsely at their trials and that he testified as he did under compulsion, the testimony being secured

in the manner set out in appellants' petition except that he was not whipped but that he saw others whipped. He says that he was, at the time of making the affidavit, serving a six-year sentence in the penitentiary on a plea of guilty to murder in the second degree for killing Clinton Lee (Tr., pp. 16-17).

Exhibit "C" to the petition purports to be an unsigned, unsworn affidavit of John Jefferson, a convict in the State Penitentiary on a sentence to plea of guilty for murder in the second degree for killing Clinton Lee. He says he was not guilty but plead guilty to keep from being sent to the electric chair. He heard others being whipped and saw the results and heard they had an electric chair in jail but didn't see it. He says they threatened to beat him up if he didn't testify against the appellants and that he did testify falsely to prevent this (Tr., pp. 18-19).

Exhibit "D" is a transcript of the record of the cases of appellants in the Phillips Circuit Court, where appellants were tried. It begins on page 23 and ends

on page 64 of the transcript. Page 23 gives the order showing the court to be in session according to law and pages 23 to 25 show the regular and lawful constitution of the grand jury. Pages 25 and 26 show the regular return of an indictment against appellants. Page 27 shows service of copy of indictment on appellants. Beginning on page 27 is bill of exceptions in regular form settting out the testimony.

For the State, R. L. Brooks testified that he saw Clinton Lee killed at the place and time charged in the indictment and that the bullet came from the South (Tr., pp. 28-29)

Dr. O. Parker testified for the State that he was a physician and saw Clinton Lee dying and that he died in a few minutes afterwards, while the physician was engaged with another wounded man and then he turned and saw Mr. Lee after he was dead (Tr., p. 29)

Tom Faulkner testified on behalf of the State that he was present at the killing and saw three negroes three or four hundred yards South of the house and that

he saw one of the negroes fire two shots toward the car in which Lee was sitting (Tr., p. 30). That the killing was done with a rifle, and that he did not know the parties but knew they were negroes (Tr., p. 31).

John Jefferson testified for the State that he knew the defendants and belonged to the Farmers' Household and Progessive Union at Elaine and that appellant Hicks was president of one Lodge and appellant Knox was president of another (Tr., p. 31) and that he was present at the lodge and that the members took guns and that they met Thursday night before the killing and that they had the guns that night (Tr., pp. 31-32) and that he went to Moore's house before daylight on October 1st and heard Frank Moore say that they had been into it at Hoop Spur and they had killed a man (Tr., p. 33). He saw all five of the appellants. He heard Frank Moore saying during the morning on the bridge in the road and he says come on up here, don't you hear that shooting; let's go up there and help them people out and he paired us up. two and two. It was Frank Moore and Hicks

and Knox, these men over here. Moore got in front and says come on, let's go and help them people out at the shooting, and he started on out through the field and through the woods toward Hoop Spur, Moore in front, Hicks in the middle and Knox at the rear end. Knox's business was to shoot down anyone who broke ranks. Paul Hall was in the gang. And so was Sweat Coleman. He had a 45-70 gun. Frank Moore, Ed Hicks and Knox had me in charge, and Coleman and Paul Hall was along, and all had guns. We come out through the field about a quarter of a mile from the house and saw a bunch of white men and Hicks says let's go across this way and cut them off (Tr., pp. 34-35). Ed Hicks and Frank Moore guided us. As we crossed the railroad, Frank Hicks made two shots and Moore was out there in the road near Hicks (Tr., pp. 35-36). Sweat Coleman was in the gang; so was Jo Knox. After Hicks shot the first shot he took his gun down and re-loaded it and somebody in the gang told him don't shoot but he says I am going to shoot and when he made the second shot he said "I

would have got that guy if it hadn't been for the horse." There was a horse between him and this getleman where he shot. After that, the gang split up, some on the West side of the railroad and some on the East (Tr., p. 37).

CROSS-EXAMINATION.

It was nigh a mile or two from where this shooting was done by Hicks up to where the shooting we had heard. After the shooting we went over to Yellow Banks and I was arrested on the Alderman place. I have been indicted for murder inthe first degree. I have never been before the grand jury. I didn't expect to kill any one when I went into the lodge and did not join for that purpose (Tr., p. 38).

Q. Whose gun did Ed Hicks use in shooting at Mr. Lee?

A. I seen him with it when I first seen him; I ain't seen him get it from nobody else.

Q. Did Sweat Coleman have a gun at that time?

A. Yes, sir, he had a 45-72 (Tr., 38).

Q. When did you find out that somebody was to be killed after you joined that lodge?

A. I didn't find out that nobody was to be killed but I heard this Hill mention it in the lodge that it was going to be trouble but just for to say kill somebody, I never heard nothing about that (Tr., p. 39).

Walter Ward, for the State, testified as follows:

I know Paul Hall, Frank Moore, Ed Hicks, Sweat Coleman, J. E. Knox and I belong to the Farmers' Progressive Household Union of America—the same lodge that Hicks and them belong to, I mean these fellows over here. Hill and Hicks had charge of the lodge that I joined but I saw these other fellows in the Union there. They all taken guns. They said they was looking for trouble. That is what the head leaders said. Ed Hicks is one of them and Hill and Frank Moore (Tr., p. 40). About half past four on Wednesday morning Paul Hall woke me at home and told me to go to Ed Hicks' house.

He said Frank Moore sent him after me and for me to go and wake up the President. I didn't know what he wanted me to do until I got over there. I got a gun from Frank Moore, a .32 Smith & Wesson. He didn't tell me what he wanted me to do with the gun until the shooting at Hoop Spur then he hollowed "Come on" and he lines us up two deep and he got in the lead and had Hicks near the middle and Sweat was behind (Tr., p. 42). Knox and Paul Hall were in the line but I couldn't tell you where. I heard Frank Moore telling Ed Hicks that he had been to Hoop Spur and had killed a white man and a colored one and he said let's go and he says if a man breaks rank he was going to turn loose on him and if they find a man picking cotton in the field, that is where they were going to kill him at, right away. I saw Sweat Coleman there at Frank Moore's house that morning and he had a 45-70, but I didn't hear him say what he was going to do with it. From Moore's house we went on up to where that gang of white folks was at the house and we split up there. Frank Moore and

Frank Hicks sat down in the road. Paul Hall was over in the field on the other side of the road. Old man Coleman was on the other side of the road, I don't know which side. Knox was up on the railroad; Frank Hicks made two shots, about ten yards from where I was; Frank Moore was sitting down close to him. He shot right up the road at the McCoy house North (Tr., pp. 42-43).

CROSS-EXAMINATION.

I was told to go to Ed Hicks' house and wake him up and to wake up all on that road and I went. Nobody didn't go with me but some come behind me. All the gang was behind me. I am indicted for killing Clinton Lee, but I didn't shoot at him nor tell anybody else to nor have any agreement with anybody else.

Q. Did any one in this affair have any agreement there with anybody else that anyone would be or should be killed?

A. That was Hill's speech that night (Tr., p. 43).

After the shooting I run—started to run and they said God Damn you stop; where in the Hell you negroes going and we stopped and some of us laid down in the woods and some of us got behind stumps and laid there until Frank Moore said let's go and we went on back down in the corn field and when the train passed up Frank and them went on to Henry Thomas' house. I went across Yellow Banks and stayed there until dark. I went on across Mr. Craig's and Mr. Crow's field and back on the place. Knox was over there (Tr., p. 44). I woke up the President and told him Frank Moore sent for us to meet over at Frank Moore's house and we met over there (Tr., p. 45).

Dave Archer testified for the State as follows:

I know Paul Hall, Frank Moore, Ed Hicks, Sweat Coleman and J. E. Knox (Tr., p. 45). Ed Hicks sent out some men after the follows that didn't belong to the union to capture them and put them—they captured me, I mean these negroes, and carried me over and put me in Ed Hicks' squad at Paul Hall's house and I stayed there

about an hour before I got away. Hicks was pointing the way for us men to go to watch for the white people. He said they was going to kill the white people when they got down there and he told us negroes to do that and I went down in the slough with them and when we got down in the slough I laid my weapon down and says "I will be back directly," I says you watch until I come back and I went on down in the slough and got in the field, the way they carried me; and I went on down to Elaine and before I got to Elaine good the white people was coming up there and so Mr. Stokes—I got away and went to Elaine and got Mr. Stayton to bring me to his house. Frank Moore made a speech and said he was going to do the same thing he was telling his men, he was going to kill all the white people that come down there that evening. Sweat Coleman carried me right through his yard. Paul was at his house. They carried me over to Frank's and then they celebrated me over at Paul's house. Paul Hall hid a Winchester that morning and said he was watching for the white folks (Tr., 47).

CROSS-EXAMINATION.

Just as soon as I got away from them I told Mr. Stokes what was going on over there—that same day. I told him who carried me over there. They made me bet my gun too, a double-barrel shot gun. I had my loads in my pocket. I was badly frightened. Mr. Hicks and Mr. Moore were the boss-men (Tr., p. 48).

J. Graham Burke testified for the State:

I had a conversation with Sweat Coleman, J. E. Knox, and Ed Hicks in the County Judge's office in an investigation that we were making. We sent for them, they were in jail, and brought them out there. Warrants had been issued for them. We just merely asked them questions and they either denied or admitted (Tr., p. 49). No coercion was used in talking to these negroes and no promises of reward. Their statements were voluntarily made. Sweat Coleman said he was a member of the Union (Tr., p. 50). He said he went up to Frank Moore's or Paul Hall's house and they sat around there and different ones of them ganged around there until 11

or 12 o'clock, when the shooting happened at Hoop Spur. The gang organized and went towards Dr. Richardson's place, and that when they got to the railroad track Sweat told about these two shots being fired, and said they split up there and went on each side of the railroad. Knox's statement was practically the same as Sweat's. He admitted that he went up there with the gang. Ed Hicks' statement was about the same, that he was in the gang that went towards Mr. McCoy's house and that after he got up there these shots were fired, that he took a gang of negroes and went on one side of the railroad—seems the crowd split there, part following Frank Moore and some went with him (Tr., pp. 50-51).

The court instructed the jury correctly on the law (Tr., pp. 51-54) as may be seen by reference to the case of Ed Hicks vs. State, 143 Ark., 158. Thereupon, the jury retired and in due time returned a verdict of guilty of murder in the first degree, to which exceptions were properly taken (Tr., p 54). Motion for new trial was presented in due time by counsel for the defendants

(Tr.,p. 55). The motion for new trial was overruled by the trial court and the defendants, appellants here, prayed an appeal from the judgment of the Phillips Circuit Court to the Supreme Court of Arkansas, which appeal was granted and the defendants given sixty days in which to prepare, tender and file their bill of exceptions. The bill of exceptions was prepared, signed and filed within the time prescribed by law (Tr., p. 55). The order showing the court to be open in due form and the order receiving the verdict lawfully are found on page 56 of the transcript. The order of judgment and sentence is found on pages 56 and 57 and is in regular, lawful form. The motion for new trial was in regular form, set up all of the objections which could be made on behalf of the defendants and their interests were properly preserved (Tr., pp. 57-60). The order of the court overruling the motion for new trial and granting an appeal is found on page 63 and is regular. The record sets out the opinion of the Supreme Court of the State of Arkansas (Tr., p. 64) and the judgment of conviction af-

firmed (Tr., p. 67). The decision may be found in 143 Ark., 158, Hicks vs. State, and we assume that the court does not wish to burden the members with a quotation of this case.

Petition for re-hearing of the cause in the Supreme Court of Arkansas was filed April 19th, 1920, in due form and overruled (Tr., pp. 68-70).

Exhibit "E" is a letter written to the Governor of Arkansas by certain citizens of Helena, insisting that the law should take its course (Tr., p. 71).

The opinion in the case of Frank Hicks is found on pages 72 to 75 of the transcript but we do not set it out for the reasons above stated.

Exhibit "G" are proclamations of the Governor fixing dates of execution (Tr., pp. 75-76).

Exhibit "H" to the petition is a copy of a resolution by Richard L. Kitchens Post No. 31 of the American Legion at Helena expressing in it, as the opinion of the Post, that executive clemency would do more harm in the community and would breed lawlessness as well as

disregard for constituted authority, inasmuch as appellants had been convicted of murder in the first degree. The resolution was a protest against the commutation of any of the sentences, and a committee of four was appointed to present the resolution to the Governor (Tr., pp. 76-77).

Exhibit "I" was a similar resolution of the Rotary Club of Helena, adopting a resolution similar to that adopted by the Kitchens Post and ordering that a copy of the resolution officially signed, be sent to the Kitchens Post (Tr., p. 78).

Exhibit "J" was a resolution of the Helena Lions Club adopting the resolution passed by the Legion Post (Tr., pp. 78-79).

Exhibit "K" is the opinion of the Arkansas Supreme Court delivered June 20, 1921, in the case of the State, *ex rel* vs. Martineau, chancellor, in which a writ of prohibition was issued quashing writ of habeas corpus and injunctive order issued by the Chancery Court (Tr., pp. 79-86). This decision may be found in 149 Ark., 237.

For the reasons above stated, we do not set out the opinion in full.

The petition for the writ of habeas corpus in the United States District Court was supported by the affidavits of T. K. Jones and H. F. Smiddy, being found respectively on pages 86 and 91 of the transcript.

T. K. Jones stated in his affidavit that he knew the appellants; that he was a special agent for the Missouri Pacific Railroad; that he was at Helena, Arkansas, on the night of September 30, 1919; that he had a request from Mr. Dick Dazell about seven o'clock P. M. on that day asking if Officers Smiddy and Adkins could go with Charles Pratt to Elaine that night to arrest a man by the name of Clem charged with misdemeanor, and I gave him permission. Mr. Smiddy and Mr. Adkins were working under witness; that Smiddy did not go but Adkins did, leaving about nine o'clock; that about two o'clock in the night Dazell 'phoned witness that this man had gotten into some trouble at Hoops Spur and asked if Mr. Smiddy and I could go with him and others to investigate,

and we went, reaching Hoops Spur Church at three-thirty or four o'clock in the morning. Found the dead body of Adkins near the church; left and returned about sun-up; church house disarranged; shed on the north side of the church had been shot into (Tr., pp. 86-87).

In the afternoon of the first of October, witness heard some white men talking and making threats to kill their negroes if they ever heard of their joining the Union, but does not know who these men were. I stood guard near the Hoops Spur Commissary from eight o'clock in the morning 'till twelve-thirty P. M. with orders to arrest every negro who came by, but I saw none. We heard that the negroes were going to attack the McCoy House and we went down there and remained until three o'clock, and no attack was made. While there Lieutenant Taplin was brought in shot in the left side of the face and neck with a load of buckshot, and he died. While there I saw a bunch of negroes across the railroad going East one-half mile South of the McCoy House, and disappear in a corn field, but did not see any weapons.

None of them stopped and shot. I saw Clinton Lee after he was shot and saw the hole in the rear of the automobile. The Hoops Spur Church was burned down during the day (Tr., p. 88)

From the information I gathered down there, the trouble started because the white folks objected to the negroes having a union (Tr., p. 88). I saw a great many negroes whipped on the third floor of the County Jail to compel them to give evidence. Smiddy conveyed a number of prisoners from the jail to be examined by the Committee of Seven. The negroes were not whipped, but formaldehyde was put in their noses and they were stripped naked and put into an electric chair to further frighten and torture them. I whipped probably two dozen negroes myself. I either whipped or help whip several of these petitioners, including Frank Moore and J. E. Knox. Not all of the prisoners were whipped. The negroes were indicted without taking before the Grand Jury the witnesses. Some person would go before the

Grand Jury and would tell what such and such a person would testify to (Tr., 89-90).

The feeling against the defendants was very bitter and strong. The trial was brief. Shortly after the negroes were placed in jail, a mob was formed, but the presence of soldiers and the advice of level-headed citizens prevented the purpose of the mob (Tr., p. 90).

The affidavit of H. F. Smiddy was to the same effect as that of T. K. Jones (Tr., pp. 91-99).

The cause was heard in the United States District Court on September 26, 1921, upon demurrer filed by the State of Arkansas, stating that the petition for writ of habeas corpus did not allege facts sufficient to entitle the petitioners to the relief asked and prayed that the petition be dismissed, and for all other general and proper relief. The cause was heard before the Honorable John H. Cotteral of Oklahoma acting as United States District Judge by assignment in place of the Honorable Jacob Trieber, Judge of the Court. On September 27 Judge Cotteral rendered his decision sustaining the de-

murrer and motion to dismiss (Tr., pp. 100-101). On the same day prayer for appeal was made and granted (Tr., p. 102), and the formalities necessary to perfecting the appeal were duly complied with (Tr., pp. 103-105).

As stated above, a stipulation of counsel was filed, agreeing that both the above entitled causes might be submitted to the Supreme Court of the United States and briefed together and consolidated and heard on record in No. 595, the stipulation being filed November 14, 1921, No. 595 of the October Term of 1921 being the case of Frank Moore, Ed Hicks, J. E. Knox, Ed Coleman and Paul Hall, Appellants, vs. E. H. Dempsey, keeper of the Arkansas State Penitentiary, Appellee; and the cause is here on appeal.

BRIEF AND ARGUMENT.

The appellant, Frank Hicks, was indicted by the Grand Jury of Phillips County, Arkansas, for murder in the first degree, alleged to have been committed by shooting one Clinton Lee, and his trial on said indictment in the Phillips County Circuit Court resulted in his conviction of murder in the first degree. Appellants Frank Moore, Ed Hicks, J. E. Knox, Ed. Coleman and Paul Hall, were jointly indicted by said Grand Jury for the same crime and were tried together, and were all convicted of murder in the first degree in said Court. Subsequent to their trials and conviction, they filed and presented to the trial court their motions for new trials, which motions were overruled by the trial court, to which action appellants duly objected and excepted. Whereupon, they prayed and were granted appeals to the Supreme Court of Arkansas, where the judgments of the trial court were affirmed on the 29 day of March, 1920.

One of appellants' assignment of errors in their motions for new trials was, that their trials occurred under

such circumstances that they were convicted without due process of law. In other words, they contended, on appeal to the Supreme Court of Arkansas, that the trial court was dominated by mob violence and "a committee of seven" to such an extent that they did not get a fair and impartial trial, and were convicted contrary to the provisions of Section 1 of Article 14 of the Federal Constitution. The facts, with reference to said assignment of error in the motions for new trials, and urged in the Supreme Court, were not developed during the course of the trials in the lower court, but were brought into the record by affidavits filed in support of the motions for new trials. Mr. J. Smith of the Supreme Court of Arkansas, in delivering the opinion of that court in said cases, among other things, said:

> "It is now insisted that because of the indictments developed at the trial and those recited in the motion for new trials, and the excitement and feeling growing out of them, no fair trial was had, or

could have been had, and that the trial did not, therefore, constitute due process of law.

It is admitted, however, that eminent counsel was appointed to defend appellants, and no attempt is made to show that a fair and impartial trial was had, except as an inference from the facts stated above, the insistence being that a fair trial was impossible under the circumstances stated.

We are unable, however, to say that this must necessarily have been the case. *The trials were had according to law, the jury was correctly charged as to the law of the case, and the testimony is legally sufficient to support the vedicts returned. We can not, therefore, in the face of this affirmative showing, assume that the trial was an empty ceremony, conducted for the purpose only of appearing to comply with the requirements of the law, when they were not in fact being complied with.*"

Hicks vs. State, 143 Ark., 158.

After the Supreme Court of Arkansas had affirmed the judgments of the trial court, appellants filed their motions for rehearing, which motions for rehearing were overruled by the Supreme Court (Tr., p. 70).

On the 9th day of April, 1921, the Governor of Arkansas, under the provisions of Section 3262 of Crawford & Moses' Digest of the Statutes of Arkansas, fixed the date for the execution of appellants to be on the 10th day of June, 1921 (Tr., p. 75).

On the 8th day of June, 1921, appellants filed their petitions for a writ of habeas corpus in the Chancery Court of Pulaski County, Arkansas, seeking therein to restrain and enjoin appellee herein from proceeding under the proclamation of the Governor, as aforesaid, from carrying into effect said proclamation (Tr., p. 79). Said Chancery Court immediately ordered the issuance of said writ returnable before the Court at two o'clock P. M. on June 10, 1921. In the meantime, the Attorney General of Arkansas filed his petition for a writ of prohibition restraining said Chancellor from further pro-

ceeding on appellants' petitions for writs of habeas corpus. The Attorney General's petition for writ of prohibition was granted by the Supreme Court of Arkansas on June 20, 1921. State vs. Martineau, 149 Ark., 237. Thereafter, on the 4th day of August, 1921, appellants made application to the Honorable Oliver Wendell Holmes, Associate Justice of the Supreme Court of the United States for a writ of error, to the Supreme Court of the State of Arkansas, in the matter of said writ of prohibition, but same was denied (Tr., p. 9). The Governor of Arkansas, in pursuance of the authority of Section 3262 of Crawford & Moses' Digest of the Statutes of Arkansas, again set the date of appellants' execution for the 23rd day of September, 1922, but before said date appellants filed their petitions for writs of habeas corpus in the United States District Court for the Western Division of the Eastern District of Arkansas, on the 21st day of September, 1921 (Tr., p. 10).

The motions for new trials filed in the trial court, supported by certain exhibits, the petition for habeas

corpus before the Pulaski Chancery Court and the petitions for habeas corpus filed by appellants in the United States District Court for the Western Division of the Eastern District of Arkansas, are substantially the same. The petitions for writs of habeas corpus now before this court, are merely a repetition of the allegations contained in motions for new trials, filed in the trial court, with reference to the excitement prevailing at and before the trials in the Circuit Court and the alleged domination of mob violence. Said petitions now before this Court are also merely a repetition of the petitions filed in the Pulaski County Chancery Court, and reviewed by the Supreme Court of Arkansas on the State's petition for a writ of prohibition. All of said petitions contained allegations that the appellants, being negroes, were denied the right and privilege guaranteed by the Constitution of the United States by the exclusion of their race from the Grand Jury and from the trial jury in Phillips County. The motions for new trials and the various petitions filed by appellants recite copies of cer-

tain publications in newspapers and resolutions passed by civil and fraternal organizations prior to the trials and subsequent thereto, alleged to be calculated to arouse the white people of Phillips County to a high pitch of excitement. Said petitions give what purports to be a history of the events leading up to the killing of Clinton Lee, and declare the innocence of appellants of the crime charged in the indictments. Said petitions allege that the witnesses testifying in behalf of the State of Arkansas were tortured into giving false testimony, which said witnesses had retractetd since the trials in the lower court.

Said petitions allege that prior to the indictments there had been an investigation by a committee of white citizens of Phillips County, Arkansas, for the purpose of ascertaining who were the guilty parties in the homicide, which had occurred, and that "the entire trial, verdict and judgment against them was but an empty ceremony; that their real trial and condemnation had already taken place before 'said Committee of Seven'; that said com-

mittee, in advance of the sitting of the court, had set in judgment upon their and all other cases and assumed and exercised the jurisdiction of the court by determining the guilt or innocence of those in jail, had acquired the evidence in the manner herein set out, and decided which of the defendants should be electrocuted and which sent to prison, and the terms to be given them, and which to be discharged; that when court convened, the program laid out by said committee was carried through, and the verdict against petitioners was pronounced not as the independent verdict of an unbiased jury, but as part of the prearranged scheme and judgment of said committee, that in doing this, the court did not exercise the jurisdiction given it by law *and wholly lost its jurisdiction by substituting for its judgment the judgment of condemnation of said committee.*" (Tr, pp. 6-7). See also State vs. Martineau, 149 Ark., 243-244.

It will be observed from the recitals, and prayer for relief, of appellants' petitions for writs of habeas corpus,

that the only issue that is before this court for its consideration is, does the record herein show on its face that the trial court was under the influence of mob domination during the course of the trial of these causes to such an extent that the effect thereof wrought a disillusion of the court, so that the procedings therein were *coram non judice*.

The petitions for writs of error were filed by appellants in the United States District Court for the Western Division of the Eastern District of Arkansas, under the provisions of Section 753, Rev. Stat. Comp. Stat. 1913, Sec. 1281. Under the provisions of said section, before appellants would be entitled to the relief sought, it must appear that they are held by the appellee, E. H. Dempsey, Keeper of the Arkansas State Penitentiary, in violation of the Constitution of the United States. Rogers vs. Peck, 199 U. S., 425, 434.

Inasmuch as appellants are held in custody of appellee by reason of their conviction upon criminal charges, before a court having the power and authority

to hear and determine the same, it results from the very nature of the writs themselves that they cannot have relief on habeas corpus mere errors in point of law, however serious, committed by a criminal court in the exercise of its jurisdiction over a case properly subject to its cognizance, *cannot be reviewed by habeas corpus. A writ of habeas corpus cannot be invoked as a substitute for the writ of error.*

Ex Parte Parks, 93 U. S. 18, 21;

Ex Parte Siebold, 100 U. S. 371, 375;

Ex Parte Royall, 117 U. S. 241;

Re Frederich, 149 U. S. 70, 75;

Baker vs. Grice, 169 U. S. 284, 290;

Tinsley vs. Anderson, 171 U. S. 101, 105;

Markuson vs. Boucher, 175 U. S. 184;

Frank vs. Mangrum, 237 U. S. 309.

It is a well established principle of law that the due process of law that is required by Section 1 of Article 14 of the Constitution of the United States, that a criminal prosecution in the Courts of a State, based upon a law

not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the State, so long as it includes notice and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure, is due process of law in the sense that term is used in our Federal Constitution.

Walker vs. Sanvinet, 92 U. S. 90, 93;

Hurtado vs. California, 110 U. S. 516, 535;

Andrews vs. Swartz, 156 U. S. 272, 276;

Bergemann vs. Backer, 157 U. S. 655, 659;

Rogers vs. Peck, 199 U. S 425, 434;

U. S. Ex Rel Drury vs. Lewis, 200 U. S. 17;

Felts vs. Murphy, 201 U. S. 123, 129;

Howard vs. Kentucky, 200 U. S. 164;

Frank vs. Mangrum, 237 U. S. 309.

In view of the well established principles of law, as announced by this Court in the foregoing authorities, we shall confine our discussion to the question of

whether or not the law and procedure followed by the prosecution in the cases herein through the various State Courts, were conducted according to the settled course of judicial proceedings as established by the laws of the State of Arkansas.

From an examination of the record herein, it will be observed first, that the Circuit Court of Phillips County, Arkansas, in which the trials were had, originally, was duly opened and constituted, and that the Grand Jury which returned the indictments was duly summoned, sworn, empaneled and charged in keeping with the laws of the State of Arkansas (Tr., p. 23).

Second. The indictments were lawfully returned in keeping with the provisions of the Statute of the State (Tr., p. 26).

Third. The indictments herein were sufficient in every particular, complying with the Statute in such cases made and provided (Tr., p 26).

Fourth. The court, at the time of trial, was duly constituted. Appellants were duly arraigned and the

jurors were duly sworn touching their qualifications to serve as jurors, accepted by appellants and sworn and empaneled to try said cases (Tr., pp. 56, 57).

Fifth. The evidence of both the State and the accused was heard, the jury was instructed according to law, after which it retired to consider its verdict; subsequently thereto returning into court a verdict finding appellants guilty of murder in the first degree (Tr.,p. ——).

Sixth. After their trials and conviction as aforesaid, appellants filed their motions for new trials (Tr., pp. 57-60).

Seventh. The said motions for new trials were duly heard by the trial court and overruled (Tr., p. 63).

Eighth. Within the time allowed by law, and within the time fixed by the trial court, appellants duly filed their bills of exceptions, which were by the court approved and ordered filed as a part of the record (Tr., p. 55).

Ninth. Appeals from the action of the Circuit Court of Phillips County, convicting the accused, were granted January 9, 1920, and the records of said trials duly filed in the Supreme Court of the State of Arkansas, on January 9, 1920.

Tenth. The causes were consolidated and heard by the Supreme Court of the State of Arkansas on said appeals, and the judgment of the trial court affirmed on March 29, 1920. See 143 Ark., 158-164.

Eleventh. Appellants' motion for rehearing was duly filed in the Supreme Court of the State of Arkansas, and subsequent thereto said motion was overruled by said court.

It will be observed from the foregoing recitals of the record herein, which, for the purpose of the demurrer, is conceded to be true, that appellants were charged with violating the law of murder and that such law is not repugnant to the Federal Constitution; that the prosecution of appellants by the State of Arkansas was conducted according to the well established course of judi-

cial proceedings as established by the laws of said State; that appellants were present in person and by counsel at all stages of said proceedings; that the trials were had in accord with competent jurisdiction, according to the well established modes of procedure. Therefore, appellants were not denied the equal protection under the law, nor are they entitled to the relief sought under Section One of Article 14 of the Constitution of the United States.

It is well established by the decisions of this court that the office of a writ of habeas corpus cannot be employed to review irregularities or alleged erroneous rulings made during the trial, however serious; it can only be invoked in cases where the judgments under which the persons are detained show to be absolutely void for want of jurisdiction in the courts that pronounced them, either because such jurisdiction was absent at the beginning, or because it was lost during the course of the proceedings.

The laws of the State of Arkansas provide for an appeal in criminal cases to the Supreme Court of that State upon divers grounds, including such as those upon which it is here asserted that the trial court was lacking in jurisdiction. Section 2129, Crawford & Moses' Digest of the Statutes of Arkansas. While Section 1 of Article 14 of the Constitution of the United States does not require that a State shall provide for an appellate review in criminal cases, it is clearly obvious that when such an appeal is provided for, and the prisoner has had the benefit of it, as in the cases at bar, the proceedings in the appellate tribunal are to be regarded by this Court as part of the process of law under which said prisoner is held in custody by the State, and to be considered in determining any question of alleged deprivation of his life or liberty contrary to Section 1 of Article 14 of the Constitution of the United States.

McKane vs. Durston, 153 U. S., 684, 687;

Andrews vs. Swartz, 156 U. S., 272;

Rogers vs. Peck, 199 U. S., 425, 435;

Reetz vs. Michigan, 188 U. S., 505, 508;

Franks vs. Mangrum, 237 U. S., 309.

This Court, in discussing the "due process clause" of the 14th Amendment to the Federal Constitution, said, in the case of Frank vs. Mangrum, *supra*:

> "In fact, such questions as are here presented under the due process clause of the 14th Amendment, though sometimes discussed as if involving merely the jurisdiction of some court or other tribunal, in a larger and more accurate sense involve the power and authority of the state itself. The prohibition is addressed to the state; if it be violated, it makes no difference in a Court of the United States by what agency of the state this is done; so, if a violation be threatened by one agency of the state, but prevented by another agency of higher authority, *there is no violation by the state. It is for the state to determine what courts or other tribunals shall be established for the trial of offenses against its criminal laws, and to define their*

several jurisdictions and authority as between themselves. And the question whether a state is depriving a prisoner of his liberty without due process of law, where the offense for which he is prosecuted is based upon a law that does no violence to the Federal Constitution, cannot ordinarily be determined, with fairness to the state, until the conclusion of the course of justice in its courts."

Virginia vs. Rives, 100 U. S., 313, 318;

Civil Rights Cases, 109 U. S., 3, 11.

McKane vs. Durston, 153 U. S., 684, 687;

Dreyer vs. Illinois, 187 U. S., 71, 83, 84;

Reetz vs. Michigan, 188 U. S., 505, 507;

Carfer vs. Caldwell, 200 U. S., 293, 297;

Waters Pierce Oil Co. vs. Texas, 212 U. S., 86, 107;

Re Frederich, 149 U. S., 70, 75;

Whitten vs. Tomlinson, 160 U. S., 231, 242;

Baker vs. Grice, 169 U. S., 284, 291;

Minnesota vs. Brundage, 180 U. S., 499, 503;

Urquhart vs. Brown, 205 U. S., 179, 182.

This court, in numerous decisions, has held, that where it is made to appear to a Federal Court that an applicant for a writ of habeas corpus is in custody of a State officer, in the ordinary course of a criminal prosecution, as appellants are in the case at bar, under a law of the State not in itself repugnant to the Federal Constitution, the writ of habeas corpus, in the absence of very special circumstances, ought to be issued until the State prosecution has reached its conclusion, *and not even then until the Federal questions arising upon the record have been brought before this court upon a writ of error.*

Ex Parte Royall, 117 U. S., 241;

Re Frederich, 149 U. S., 70;

Whitten vs. Tomlinson, 160 U. S., 231, 242;

Baker vs. Grice, 169 U. S., 284, 291;

Tinsley vs. Anderson, 171 U. S., 101, 105;

Markuson vs. Boucher, 175 U. S., 184;

Urquhart vs. Brown, 205 U. S., 179;

Frank vs. Mangrum, *supra.*

The same idential question that is now before this court in this case,—that of whether or not appellants were deprived of their liberty in the trial court, without due process of law, contrary to the provisions of Section 1 of Article 14 of the Federal Constitution, was before the State Supreme Court on two different occasions. The first time, in an assignment of error in the motion for a new trial in the case of Hicks vs. State, 143 Ark., 158; the second time in the case of State vs. Martineau, 149 Ark., 237. In the case of Hicks vs. State, *supra,* the State Supreme Court said:

> "It is now insisted that because of the incidents developed at the trial and those recited in the motion for new trials, and the excitement and feeling growing out of them, no fair trial was had, or could have been had, and that the trial did not, therefore, constitute due process of law.
>
> It is admitted, however, that eminent counsel was appointed to defend appellants, and no attempt

is made to show that a fair and impartial trial was not had, except as an inference from the facts stated above, the insistence being that a fair trial was impossible under the circumstances stated.

We are unable, however, to say that this must necessarily have been the case. *The trials were had according to law, the jury was correctly charged as to the law of the case, and the testimony is legally sufficient to support the verdicts returned. We cannot, therefore, in the face of this affirmative showing, assume that the trial was an empty ceremony, conducted for the purpose only of appearing to comply with the requirements of the law, when they were not in fact being complied with.*"

In the case of State vs. Martineau, *supra*, the second time the question of whether or not appellants were deprived of their property without due process of law, the Supreme Court of Arkansas, speaking through its Chief Justice, said:

"Counsel for the respondents rely on the case of Frank vs. Mangrum, 237 U. S., 309, as sustaining this contention, but an analysis of that decision and a consideration of the language employed by the learned justice who wrote it shows very clearly that such is not the effect of that decision. The court distinctly recognized the well established rule at common law and under the British statutes, that on habeas corpus a court was confined in its inquiry to the face of the process of the judgment under which the prisoner was held in custody. The case of Ex Parte Watkins, 3 Peters 193, was cited where Chief Justice Marshall, in delivering the opinion of the court, followed the common-law rule stated above and decided that a court could not, under habeas corpus, look beyond the face of the judgment of a court of competent jurisdiction to determine whether or not a prisoner was being unlawfully held. This is in accordance with repeated decisions of our own court holding that, if a peti-

tioner for habeas corpus 'is in custody under process regular on its face, nothing will be inquired into save the jurisdiction of the court whence the process came.' State vs. Neel, 48 Ark., 283; Ex Parte Barnett, 51 Ark., 215; Ex Parte Perdue, 58 Ark., 285; Ex Parte Foote, 70 Ark., 12; Ex Parte Byles, 93 Ark., 612; Ex Parte Williams, 99 Ark., 475.

But the Supreme Court of the United States in the Frank case, *supra*, held that Congress had, by the act of February 5, 1867 (Revised Statutes, Par. 753 *et seq.*), conferred upon the Federal courts express authority to inquire beyond the face of the process or judgment under which a prisoner is being and had 'extended the writ of habeas corpus to all cases of persons restrained of their liberty in violation of Constitution or law or treaty of the United States.' Further speaking on this subject, the court said: 'The effect (Acts 1867) is to substitute for the bare legal review that seems to have

been the limit of judicial authority under the common law practice, and under the act of 31 Car. 11, c. 2, a more searching investigation, in which the appellant is put upon his oath to set forth the truth of the matter respecting the causes of his detention, and the court, upon determining the actual facts, is to 'dispose of the party as law and justice require.'

The statute referred to does not apply to any courts except the Supreme Court and circuit and district courts of the United States, and it defines the practice in those courts and the powers of the courts under the remedy afforded by the writ of habeas corpus. The statute does not purport to apply to the courts of the States and Congress had no authority, had it attempted so to do, to prescribe the powers of the State courts and the practice to be followed in matters within their jurisdictions. The court in the Frank case in effect held that the statute had no application to the state courts, for it said this: '*But repeated decisions of this court*

have put it beyond the range of further debate that the 'due process' clause of the Fourteenth Amendment has not the effect of imposing upon the states any particular form or mode of procedure, so long as the essential rights of notice and a hearing, or opportunity to be heard, before a competent tribunal are not interfered with.'"

The Supreme Court of Arkansas further discussing the doctrine as announced by this court in the case of Frank vs. Mangrum, *supra*, said:

"Further discussion would seem to be useless. It was not contended in the argument here that there is any other charge in the motion upon which relief could be granted, *except the one to the effect that the trial court was dominated by a mob, which suspended the functions of the court and prevented a fair trial.* There are no other facts in the petition which would warrant a review of the judgment of the Circuit Court of Phillips County. The allegations with regard to newly discovered evidence and

the retraction by the State's witnesses, which is, in effect an allegation of the discovery of new evidence, affords no ground for a review of the judgments of conviction, for there is no provision in the laws of this State for the granting of a new trial after the lapse of the term on the ground of newly discovered evidence. Howard vs. State, 58 Ark., 229; Thomas vs. State, 136 Ark., 290; Satterwhite vs. State, ante p. 147."

Appellants' petitions herein show, that, after the Supreme Court of Arkansas had, on two different occasions decided, without a dissent, that appellants had received fair and impartial trials in the trial court,—were not deprived of their liberty without due process of law, they attempted to have this court review the judgments of the State Supreme Court by making application to Mr. Justice Holmes of this Court for a writ of error, which application was denied (Tr., p. 9).

Appellants are merely attempting to use a writ of habeas corpus to review alleged errors of law of the

State Courts, when a review thereof can only be had in this Court on a writ of error.

> "Mere errors in point of law, however serious, committed by a criminal court in the exercise of its jurisdiction over a case properly subject to its cognizance, *cannot be reviewed by habeas corpus. That writ cannot be employed* as a substitute for the writ of error."
>
> Frank vs. Mangrum, 237 U. S. 309, and cases therein cited.

This Court, in the case of Frank vs. Mangrum, *supra*, in discussing the authority of Federal Courts to interfere with the State Courts in administering the laws of the State, where same have been violated, said:

> "It follows as a logical consequence that where as here, a criminal prosecution has proceeded through all the courts of the state, including the appellate as well as the trial court, the result of the appellate review cannot be ignored when afterwards the prisoner applies for his release on the

ground of deprivation of Federal rights sufficient to oust the state of its jurisdiction to proceed to judgment and execution against him. This is not a mere matter of comity, as seems to be supposed. The rule stands upon a much higher plane, for it arises out of the very nature and ground of the inquiry into the proceedings of the state tribunals, and touches closely upon the relations between the state and the Federal governments. As was declared by this court in Ex Parte Royall, 117 U. S., 241, 252, applying in a habeas corpus case what was said in Covell vs. Heyman, 111 U. S., 176, 182, a case of conflict of jurisdiction: 'The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided by avoiding interference with the process of each other, is a principle of comity which perhaps no higher sanction than the utility which comes from concord; but between state courts and those of the United States, it is

something more. *It is a* principle of right and of law, and therefore of necessity.' And see Re Tyler, 149 U. S., 164, 186."

The case of Frank vs. Mangrum, *supra,* is almost exactly in point with the case at bar. Frank was indicted by the Grand Jury of Fulton County, Ga., for murder. He was tried on said indictment and found guilty. The trial court rendered judgment, sentencing him to death. On the same day Frank's counsel filed a motion for a new trial, which was subsequently amended so as to include one hundred and three different grounds particularly specified. Among these grounds were several raising the contention that he did not have a fair and impartial trial because of alleged disorder in and about the court room, including manifestations of public sentiment hostile to him and sufficient to influence the jury. In support of one of these, and to show the state of sentiment as manifested, the motion stated "The defendant was not in the court room when the verdict was rendered his presence having been waived by his counsel.

This waiver was accepted and acquiesced in by the court, because of the fear of violence that might be done the defendant were he in court when the verdict was rendered." Numerous affidavits were submitted by Frank in support of his motion, including eighteen that related to the allegations of disorder in and around the court room occurring at the trial. The trial court denied appellant's motion for new trial. The cause was then appealed to the Supreme Court of that State where the allegations in Frank's motion for a new trial, were considered. The Supreme Court affirmed the judgment of the trial court. After the decision of the Supreme Court, affirming the judgment of the trial court, another motion for a new trial was made under Code 1910, Sections 6089, 6092, upon the grounds of newly discovered evidence; and this having been refused, the case was again brought before the Supreme Court, and again the action of the trial court was affirmed. Shortly thereafter Frank unsuccessfully applied to the Supreme Court of Georgia for the allowance of a writ of error to

review its judgment in the Supreme Court of the United States. Thereafter, he applied to several of the Justices of this court, and finally to the Court itself, for the allowance of such a writ. These applications were severally denied. Whereupon, he made application for a writ of error to the Federal District Court for a writ of habeas corpus. The Federal District Court denied his application and he appealed to this court.

The case at bar followed the same course, step by step, through the various State and Federal Courts, that the Frank case followed; First, the trial court, twice before the State Supreme Court, application made and denied by an associate justice of this court, an application in the Federal District Court for a writ of habeas corpus, the writ denied, and an appeal taken to this Court. Inasmuch as the two cases are so near alike, we further quote from the Frank case as follows:

> "And first, the question of the disorder and hostile sentiment that are said to have influenced

the trial court and jury to an extent amounting to mob domination.

The district court having considered the case upon the face of the petition, we must do the same, treating it as if demurred to by the sheriff. *There is no doubt of the jurisdiction to issue the writ of habeas corpus.* The question is as to the propriety of issuing it in the present case. Under Sec. 755, Rev. Stat. Comp. Stat. 1919, 1283, it was the duty of the court to refuse the writ if it appeared from the petition itself that appellant was not entitled to it. And see Ex Parte Watkins, 3 Pet. 193, 201; Ex Parte Milligan, 4 Wall. 2, 110; Ex Parte Terry, 128 U. S., 289, 301.

Now the obligations resting upon us, as upon the district court, to look through the form and into the very heart and substance of the matter, applies as well to the averments of the petition as to the proceedings which the petitioner attacks. We must regard not any single clause or paragraph, but the

entire petition, and the exhibits that are made a part of it. Thus, the petition contains a narrative of disorder, hostile manifestations, and uproar, which, if it stood alone, and were to be taken as true, may be conceded to show an environment inconsistent with a fair trial and an impartial verdict. But to consider this as standing alone is to take a wholly superficial view. *The narrative has no proper place in a petition addressed to a court of the United States except as it may tend to throw light* upon the question whether the State of Georgia, having regard to the entire course of the proceedings, in the appellate as well as in the trial court, is depriving appellant of his liberty and intending to deprive him of his life wthout due process of law. *Dealing with the narrative, then, its essence, and in its relation to the context, it clearly appears to be only a reiteration of allegations that appellant had a right to submit, and did submit, first to the trial court, and afterwards to the Su-*

preme Court of the state, as a ground for avoiding the consequences of the trial; that the allegations were considered by those courts, successively, at times and places and under circumstances wholly apart from the atmosphere of the trial, and free from any suggestion of mob domination, or the like; and that the facts were examined by those courts not only upon the affidavits and exhibits submitted in behalf of the prisoner which are embodied in his present petition as a part of his sworn account of the causes of his detention, but also upon rebutting affidavits submitted in behalf of the state, and which, for reasons not explained, he has not included in the petition. *As appears from the prefatory statement, the allegations of disorder were found by both of the state courts to be groundless* except in a few particulars as to which the courts ruled that they were irregularities not harmful in fact to defendant, and therefore insufficient in law to avoid the verdict. 141 Ga., 243-280. And it

was because the defendant was concluded by that finding that the Supreme Court, upon the subsequent motion to set aside the verdict, declined to again consider those allegations.

Whatever question is raised about the jurisdiction of the trial court, no doubt is suggested but that the Supreme Court had full jurisdiction to determine the matters of fact and the questions of law arising out of this alleged disorder; nor is there any reason to suppose that it did not fairly and justly perform its duty. It is not easy to see why appellant is not, upon general principles, bound by its decision. It is a fundamental principle of jurisprudence, arising from the very nature of courts of justice and the objects for which they are established, that a question of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction cannot afterwards be disputed between the same parties. Southern P. R Co. vs. United States, 168 U. S., 1, 48. The

principle is as applicable to the decisions of criminal courts as to those of civil jurisdiction. As to its application, in habeas corpus cases, with respect to decisions by such courts of the facts pertaining to the jurisdiction over the prisoner, see Ex Parte Terry, 128 U. S., 289, 305, 310; Ex Parte Columbia George, 144 Fed., 985, 986.

However, it is not necessary, for the purpose of the present case, to invoke the doctrine of *res judicata;* and, in view of the impropriety of limiting in the least degree the authority of the courts of the United States in investigating an alleged violation by a State of the due process of law guaranteed by the 14th Amendment, we put out of view for the present the suggestion that even the questions of fact bearing upon the jurisdiction of the trial court could be conclusively determined against the prisoner by the decision of the state court of last resort.

But this does not mean that that decision may be ignored or disregarded. To do this, as we have already pointed out, would be not merely to disregard comity, but to ignore the essential question before us, which is not the guilt or innocence of the prisoner, or the truth of any particular act asserted by him, but whether the state, taking into view the entire course of its procedure, has deprived him of due process of law. This familiar phase does not mean that the operations of the state government shall be conducted without error or fault in any particular case, nor that the Federal courts may substitute their judgment for that of the state courts, or exercise any general review over their proceedings, but only that the fundamental rights of the prisoner shall not be taken from him arbitrarily or without the right to be heard according to the usual course of law in such cases.

We, of course, agree that if a trial is in fact dominated by a mob, so that the jury is intimidated

and the trial judge yields, and so that there is an actual interference with the course of justice, there is, in that court, a departure from due process of law in the proper sense of that term. And if the state, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the state deprives the accused of his life or liberty without due process of law.

But the state may supply such corrective process as to it seems proper. Georgia has adopted the familiar procedure of a motion for a new trail, followed by an appeal to its supreme court, not confined to the mere record of conviction, but going at large, and upon evidence adduced outside of that record, into the question whether the processes of justice have been interfered with in the trial court. Repeated instances are reported of verdicts and judgments set aside and new trials granted for disorder or mob violence interfering with the prison-

er's right to a fair trial. Myers vs. State, 97 Ga., 76 (5) 99, 25 S. E. 252; Collier vs. State, 115 Ga., 803, 42 S. E. 226, 12 Am. Crim. Re. 608.

Such an appeal was accorded to the prisoner in the present case. (Frank vs. State, 141 Ga., 243, 280, 80 S. E. 1016) in a manner and under circumstances already stated, and the supreme court, upon a full review, decided appellant's allegations of fact, so far as matters now material are concerned, to be unfounded. Owing to considerations already adverted to (arising not out of comity merely, but out of the very right of the matter to be decided, in view of the relations existing between the states and the Federal government), we hold that such a determination of the facts as was thus made by the court of last resort of Georgia respecting the alleged interference with the trial through disorder and manifestations of hostile sentiment cannot, in this collateral inquiry, be treated as a nullity, but must be taken as setting forth the truth of the mat-

ter; certainly until some reasonable ground is shown for an inference that the court which rendered it either was wanting in jurisdiction, or at least erred in the exercise of its jurisdiction; and that the mere assertion by the prisoner that the facts of the matter are other than the state court, upon full investigation, determined them to be, will not be deemed sufficient to raise an issue respecting the correctness of that determination; especially not, where the very evidence upon which the determination was rested is withheld by him who attacks the finding.

It is argued that if in fact there was disorder such as to cause a loss of jurisdiction in the trial court, jurisdiction could not be restored by any decision of the supreme court. This, we think, embodies more than one error of reasoning It regards a part only of the judicial proceedings, instead of considering the entire process of law. It also begs the question of the existence of such disorder as to cause a loss of jurisdiction in the trial court, which

should not be assumed, in the face of the decision of the reviewing court without showing some adequate ground for disregarding that decision. And these errors grow out of the initial error of treating appellant's narrative of disorder as the whole matter instead of reading it in connection with the context. The rule of law that in ordinary cases requires a prisoner to exhaust his remedies within the state before coming to the courts of the United States for redress would lose the greater part of its salutary force if the prisoner's mere allegations were to stand the same in law after as before the state courts had passed upon them.

We are very far from intimating that manifestations of public sentiment, or any other form of disorder, calculated to influence court or jury, are matters to be lightly treated. The decisions of the Georgia courts in this and other cases show that such disorder is repressed, where practicable, by the direct intervention of the trial court and the officers

under its command; and that other means familiar to the common law practice, such as postponing the trial, changing the venue, and granting a new trial, are liberally resorted to in order to protect persons accused of crime in the right to a fair trial by an impartial jury. The argument for appellant amounts to saying that this is not enough; that by force of the 'due process of law' provision of the 14th Amendment, when the first attempt at a fair trial is rendered abortive through outside interference, the state, instead of allowing a new trial under better auspices, must abandon jurisdiction over the accused, and refrain from further inquiry into the question of his guilt.

To establish this doctrine would, in a very practical sense, impair the power of the states to repress and punish crime; for it would render their courts powerless to act in opposition to lawless public sentiment. The argument is not only unsound in principle, but it is in conflict with the practice

that prevails in all of the states, so far as we are aware. The cases cited do not sustain the contention that disorder or other lawless conduct calculated to overawe the jury or the trial judge can be treated as a dissolution of the court, or as rendering the proceedings *coram non judice*, in any such sense as to bar further proceedings. In Myers vs. State, 97 Ga., 76, (5) 99, 25 S. E. 252, Collier vs. State, 115 Ga., 803, 42 S. E. 226, 12 Am. Crim. Rep. 608; Sanders vs. State, 85 Ind. 318, 44 Am. Rep. 29; Massey vs. State. 31 Tex. Crim. Rep. 371, 381, 20 S. W. 758; and State vs. Weldon, 91 S. C. 29, 38, 39 L. R. A (N. S.) 667, 669, 74 S. E. 43; Ann. Cas. 1913 E, 801, in all of which it was held that the prisoner's right to a fair trial had been interfered with by disorder or mob violence,—it was not held that jurisdiction over the prisoner had been lost; on the contrary, in each instance a new trial was awarded as the appropriate remedy. So, in the cases where the trial judge abdicated his proper functions or

absented himself during the trial (Hayes vs. State, 58 Ga., 36 (2) 49; Blend vs. People, 41 N. Y., 604; Shaw vs. People, 3 Hun., 272, affirmed in 63 N. Y., 36; Hinman vs. People, 13 Hun., 266; McClure vs. State, 77 Ind., 287; O'Brien vs. People, 17 Colo., 561, 31 Pac. 230: Ellerbe vs. State, 75 Miss., 522, 41 L. R. A. 569, p2 So. 950) the reviewing court of the state in each instance simply set aside the verdict and awarded a new trial.

The Georgia courts, in the present case, proceeded upon the theory that Frank would have been entitled to this relief had his charges been true, and they refused a new trial only because they found his charges untrue save in a few minor particulars not amounting to more than irregularities, and not prejudicial to the accused. There was here no denial of due process of law."

It will be observed that the only evidence substantiating appellants' petitions, is, the affidavit of appellants themselves (Tr., p. 10), the statement of Mr. Allen

in the public press, and the supporting affidavits of Walter Ward (Tr., pp. 15 and 16), George Green (Tr., pp. 16 and 17), and John Jefferson (Tr., pp. 18 and 19). We presume that the statement by Mr Allen, in the public press, was made shortly after the murder was committed, and for which appellants were convicted in the State Courts. The affidavits of Ward, Green and Jefferson, were made in May, 1921, long after the cases had been heard and determined in the State Courts. The trial of appellants occurred in the lower court at the October Term 1919 of the Phillips County Circuit Court; and the cases were affirmed on appeal by the State Supreme Court on the 29th day of March, 1920. See Hicks vs. State, 143 Ark., 158. Such affidavits were made more than a year after the cases had been affirmed by the appellate court. These affidavits were never before the trial court, nor the Supreme Court on appal. To sustain appellants' application for a writ of habeas corpus an said affidavits, would open an avenue for every person charged with a crime, to wait until he had exhausted

his remedies in the State Courts; then open his masked batteries on the State Courts, by going to the Federal Courts by petition for habeas corpus, and support said petitions by affidavits made long after the case had been determined in the State Courts. We can hardly think that this court, or any other court, would give its sanction to such practice. By filing affidavits in support of the petition, as appellants did in the case at bar, the State is deprived of cross examining said affiants to determine whether or not they are making true statements. Under such procedure the State is deprived of searching the conscience of said affiants by way of cross examination.

Again we desire to urge that for this Court to reverse the judgment of the United States District Court for the Western Division of the Eastern District of Arkansas, would open an avenue for every criminal charged with violating our State laws, to open "masked batteries" on our State Courts, indefinitely.

We respectfully submit that the United States Dis-

trict Court for the Western Division of the Eastern District of Arkansas, correctly sustained appellee's demurer and motion to dismiss appellants' petition for a writ of habeas corpus, and that the order and judgment of said court in dismissing said petition be affirmed by this Court.

Respectfully submitted,

J. S. UTLEY,
Attorney General;

ELBERT GODWIN,
Assistant Attorney General;

WM. T. HAMMOCK,
Assistant Attorney General.

Mr. Elbert Godwin, with whom *Mr. J. S. Utley*, Attorney General of the State of Arkansas, and *Mr. Wm. T. Hammock* were on the brief, for appellee.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is an appeal from an order of the District Court for the Eastern District of Arkansas dismissing a writ of *habeas corpus* upon demurrer, the presiding judge certifying that there was probable cause for allowing the appeal. There were two cases originally, but by agreement they were consolidated into one. The appellants are five negroes who were convicted of murder in the first degree and sentenced to death by the Court of the State of Arkansas. The ground of the petition for the writ is that the proceedings in the State Court, although a trial in form, were only a form, and that the appellants were hurried to conviction under the pressure of a mob without any regard for their rights and without according to them due process of law.

The case stated by the petition is as follows, and it will be understood that while we put it in narrative form, we are not affirming the facts to be as stated but only what we must take them to be, as they are admitted by the demurrer: On the night of September 30, 1919, a number of colored people assembled in their church were attacked and fired upon by a body of white men, and in the disturbance that followed a white man was killed. The report of the killing caused great excitement and was followed by the hunting down and shooting of many negroes and also by the killing on October 1 of one Clinton Lee, a white man, for whose murder the petitioners were indicted. They seem to have been arrested with many others on the same day. The petitioners say that Lee must have been killed by other whites, but that we leave on one side as what we have to deal with is not the petitioners' inno-

cence or guilt but solely the question whether their constitutional rights have been preserved. They say that their meeting was to employ counsel for protection against extortions practiced upon them by the landowners and that the landowners tried to prevent their effort, but that again we pass by as not directly bearing upon the trial. It should be mentioned however that O. S. Bratton, a son of the counsel who is said to have been contemplated and who took part in the argument here, arriving for consultation on October 1, is said to have barely escaped being mobbed; that he was arrested and confined during the month on a charge of murder and on October 31 was indicted for barratry, but later in the day was told that he would be discharged but that he must leave secretly by a closed automobile to take the train at West Helena, four miles away, to avoid being mobbed. It is alleged that the judge of the Court in which the petitioners were tried facilitated the departure and went with Bratton to see him safely off.

A Committee of Seven was appointed by the Governor in regard to what the committee called the " insurrection " in the county. The newspapers daily published inflammatory articles. On the 7th a statement by one of the committee was made public to the effect that the present trouble was " a deliberately planned insurrection of the negroes against the whites, directed by an organization known as the ' Progressive Farmers' and Household Union of America ' established for the purpose of banding negroes together for the killing of white people." According to the statement the organization was started by a swindler to get money from the blacks.

Shortly after the arrest of the petitioners a mob marched to the jail for the purpose of lynching them but were prevented by the presence of United States troops and the promise of some of the Committee of Seven and other leading officials that if the mob would refrain, as

the petition puts it, they would execute those found guilty in the form of law. The Committee's own statement was that the reason that the people refrained from mob violence was "that this Committee gave our citizens their solemn promise that the law would be carried out." According to affidavits of two white men and the colored witnesses on whose testimony the petitioners were convicted, produced by the petitioners since the last decision of the Supreme Court hereafter mentioned, the Committee made good their promise by calling colored witnesses and having them whipped and tortured until they would say what was wanted, among them being the two relied on to prove the petitioners' guilt. However this may be, a grand jury of white men was organized on October 27 with one of the Committee of Seven and, it is alleged, with many of a posse organized to fight the blacks, upon it, and on the morning of the 29th the indictment was returned. On November 3 the petitioners were brought into Court, informed that a certain lawyer was appointed their counsel and were placed on trial before a white jury—blacks being systematically excluded from both grand and petit juries. The Court and neighborhood were thronged with an adverse crowd that threatened the most dangerous consequences to anyone interfering with the desired result. The counsel did not venture to demand delay or a change of venue, to challenge a juryman or to ask for separate trials. He had had no preliminary consultation with the accused, called no witnesses for the defence although they could have been produced, and did not put the defendants on the stand. The trial lasted about three-quarters of an hour and in less than five minutes the jury brought in a verdict of guilty of murder in the first degree. According to the allegations and affidavits there never was a chance for the petitioners to be acquitted; no juryman could have voted for an acquittal and continued to live in Phillips County and if

any prisoner by any chance had been acquitted by a jury he could not have escaped the mob.

The averments as to the prejudice by which the trial was environed have some corroboration in appeals to the Governor, about a year later, earnestly urging him not to interfere with the execution of the petitioners. One came from five members of the Committee of Seven, and stated in addition to what has been quoted heretofore that "all our citizens are of the opinion that the law should take its course." Another from a part of the American Legion protests against a contemplated commutation of the sentence of four of the petitioners and repeats that a "solemn promise was given by the leading citizens of the community that if the guilty parties were not lynched, and let the law take its course, that justice would be done and the majesty of the law upheld." A meeting of the Helena Rotary Club attended by members representing, as it said, seventy-five of the leading industrial and commercial enterprises of Helena, passed a resolution approving and supporting the action of the American Legion post. The Lions Club of Helena at a meeting attended by members said to represent sixty of the leading industrial and commercial enterprises of the city passed a resolution to the same effect. In May of the same year, a trial of six other negroes was coming on and it was represented to the Governor by the white citizens and officials of Phillips County that in all probability those negroes would be lynched. It is alleged that in order to appease the mob spirit and in a measure secure the safety of the six the Governor fixed the date for the execution of the petitioners at June 10, 1921, but that the execution was stayed by proceedings in Court; we presume the proceedings before the Chancellor to which we shall advert

In *Frank* v. *Mangum*, 237 U. S. 309, 335, it was recognized of course that if in fact a trial is dominated by a

mob so that there is an actual interference with the course of justice, there is a departure from due process of law; and that "if the State, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the State deprives the accused of his life or liberty without due process of law." We assume in accordance with that case that the corrective process supplied by the State may be so adequate that interference by *habeas corpus* ought not to be allowed. It certainly is true that mere mistakes of law in the course of a trial are not to be corrected in that way. But if the case is that the whole proceeding is a mask—that counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion, and that the State Courts failed to correct the wrong, neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this Court from securing to the petitioners their constitutional rights.

In this case a motion for a new trial on the ground alleged in this petition was overruled and upon exceptions and appeal to the Supreme Court the judgment was affirmed. The Supreme Court said that the complaint of discrimination against petitioners by the exclusion of colored men from the jury came too late and by way of answer to the objection that no fair trial could be had in the circumstances, stated that it could not say "that this must necessarily have been the case"; that eminent counsel was appointed to defend the petitioners, that the trial was had according to law, the jury correctly charged, and the testimony legally sufficient. On June 8, 1921, two days before the date fixed for their execution, a petition for *habeas corpus* was presented to the Chancellor and he issued the writ and an injunction against the execution of the petitioners; but the Supreme Court of the State

held that the Chancellor had no jurisdiction under the state law whatever might be the law of the United States. The present petition perhaps was suggested by the language of the Court: "What the result would be of an application to a Federal Court we need not inquire." It was presented to the District Court on September 21. We shall not say more concerning the corrective process afforded to the petitioners than that it does not seem to us sufficient to allow a Judge of the United States to escape the duty of examining the facts for himself when if true as alleged they make the trial absolutely void. We have confined the statement to facts admitted by the demurrer. We will not say that they cannot be met, but it appears to us unavoidable that the District Judge should find whether the facts alleged are true and whether they can be explained so far as to leave the state proceedings undisturbed.

Order reversed. The case to stand for hearing before the District Court.

Mr. Justice McReynolds, dissenting.

We are asked to overrule the judgment of the District Court discharging a writ of *habeas corpus* by means of which five negroes sought to escape electrocution for the murder of Clinton Lee. § 753, Rev. Stats.[1] They were convicted and sentenced in the Circuit Court of Phillips County, Arkansas, two years before the writ issued. The petition for the writ was supported by affidavits of these five ignorant men whose lives were at stake, the *ex parte* affidavits of three other negroes who had pleaded guilty

[1] "The writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject

and were then confined in the penitentiary under sentences for the same murder, and the affidavits of two white men—low villains according to their own admissions. It should be remembered that to narrate the allegations of the petition is but to repeat statements from these sources. Considering all the circumstances—the course of the cause in the state courts and upon application here for certiorari, etc.,—the District Court held the alleged facts insufficient *prima facie* to show nullity of the original judgment.

The matter is one of gravity. If every man convicted of crime in a state court may thereafter resort to the federal court and by swearing, as advised, that certain allegations of fact tending to impeach his trial are "true to the best of his knowledge and belief," thereby obtain as of right further review, another way has been added to a list already unfortunately long to prevent prompt punishment. The delays incident to enforcement of our criminal laws have become a national scandal and give serious alarm to those who observe. Wrongly to decide the present cause probably will produce very unfortunate consequences.

In *Frank* v. *Mangum*, 237 U. S. 309, 325, 326, 327, 329, 335, after great consideration a majority of this Court approved the doctrine which should be applied here. The doctrine is right and wholesome. I can not agree now to put it aside and substitute the views expressed by the minority of the Court in that cause.

Much of the opinion in the *Frank Case* might be repeated here if emphasis were necessary. It will suffice

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or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify."

to quote a few paragraphs; but fully to understand the whole should be read.

"In dealing with these contentions, we should have in mind the nature and extent of the duty that is imposed upon a Federal court on application for the writ of *habeas corpus* under § 753, Rev. Stat. Under the terms of that section, in order to entitle the present appellant to the relief sought, it must appear that he is held in custody in violation of the Constitution of the United States. *Rogers* v. *Peck*, 199 U. S. 425, 434. Moreover, if he is held in custody by reason of his conviction upon a criminal charge before a court having plenary jurisdiction over the subject-matter or offense, the place where it was committed, and the person of the prisoner, it results from the nature of the writ itself that he cannot have relief on *habeas corpus*. Mere errors in point of law, however serious, committed by a criminal court in the exercise of its jurisdiction over a case properly subject to its cognizance, cannot be reviewed by *habeas corpus*. That writ cannot be employed as a substitute for the writ of error. . . .

"As to the 'due process of law' that is required by the Fourteenth Amendment, it is perfectly well settled that a criminal prosecution in the courts of a State, based upon a law not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the State, so long as it includes notice, and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure, is 'due process' in the constitutional sense. . . .

"It is, therefore, conceded by counsel for appellant that in the present case we may not review irregularities or erroneous rulings upon the trial, however serious, and that the writ of *habeas corpus* will lie only in case the judgment under which the prisoner is detained is shown to be abso-

lutely void for want of jurisdiction in the court that pronounced it, either because such jurisdiction was absent at the beginning or because it was lost in the course of the proceedings. . . .

"But it would be clearly erroneous to confine the inquiry to the proceedings and judgment of the trial court. The laws of the State of Georgia (as will appear from decisions elsewhere cited), provide for an appeal in criminal cases to the Supreme Court of that State upon divers grounds, including such as those upon which it is here asserted that the trial court was lacking in jurisdiction. . . .

"It follows as a logical consequence that where, as here, a criminal prosecution has proceeded through all the courts of the State, including the appellate as well as the trial court, the result of the appellate review cannot be ignored when afterwards the prisoner applies for his release on the ground of a deprivation of Federal rights sufficient to oust the State of its jurisdiction to proceed to judgment and execution against him. This is not a mere matter of comity, as seems to be supposed. The rule stands upon a much higher plane, for it arises out of the very nature and ground of the inquiry into the proceedings of the state tribunals, and touches closely upon the relations between the state and the Federal governments. As was declared by this court in *Ex parte Royall*, 117 U. S. 241, 252—applying in a *habeas corpus* case what was said in *Covell* v. *Heyman*, 111 U. S. 176, 182, a case of conflict of jurisdiction:—'The forbearance which courts of coördinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between state courts and those of the United States it is something more. It is a principle of right and of law,

MOORE ET AL. *v.* DEMPSEY, KEEPER OF THE ARKANSAS STATE PENITENTIARY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

No. 199. Argued January 9, 1923.—Decided February 19, 1923.

1. Upon an appeal from an order of the District Court dismissing a petition for *habeas corpus* upon demurrer, the allegations of fact pleaded in the petition and admitted by the demurrer must be accepted as true. P. 87.
2. A trial for murder in a state court in which the accused are hurried to conviction under mob domination without regard for their rights, is without due process of law and absolutely void. P. 90.
3. In the absence of sufficient corrective process afforded by the state courts, when persons held under a death sentence and alleging facts showing that their conviction resulted from such a trial, apply to the Federal District Court for *habeas corpus*, that court must find whether the facts so alleged are true, and whether they can be explained so far as to leave the state proceedings undisturbed. P. 91.

Reversed.

APPEAL from an order of the District Court dismissing a petition for *habeas corpus* upon demurrer.

Mr. U. S. Bratton and *Mr. Moorfield Storey* for appellants.

and, therefore, of necessity.' And see *In re Tyler, Petitioner*, 149 U. S. 164, 186. . . .

"We of course agree that if a trial is in fact dominated by a mob, so that the jury is intimidated and the trial judge yields, and so that there is an actual interference with the course of justice, there is, in that court, a departure from due process of law in the proper sense of that term. And if the State, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the State deprives the accused of his life or liberty without due process of law.

"But the State may supply such corrective process as to it seems proper. Georgia has adopted the familiar procedure of a motion for a new trial followed by an appeal to its Supreme Court, not confined to the mere record of conviction but going at large, and upon evidence adduced outside of that record, into the question whether the processes of justice have been interfered with in the trial court. Repeated instances are reported of verdicts and judgments set aside and new trials granted for disorder or mob violence interfering with the prisoner's right to a fair trial. *Myers* v. *State*, 97 Georgia 76(5), 99; *Collier* v. *State*, 115 Georgia, 803."

Let us consider with some detail what was presented to the court below.

There was the complete record of the cause in the state courts—trial and Supreme—showing no irregularity. After indictment the defendants were arraigned for trial and eminent counsel appointed to defend them. He cross-examined the witnesses, made exceptions and evidently was careful to preserve a full and complete transcript of the proceedings. The trial was unusually short but there is nothing in the record to indicate that it was illegally hastened. November 3, 1919, the jury returned a verdict of "guilty;" November 11th the defendants were sen-

tenced to be executed on December 27th; December 20th new counsel chosen by them or their friends moved for a new trial and supported the motion by affidavits of defendants and two other negroes who declared they testified falsely because of torture. This motion questioned the validity of the conviction upon the very grounds now advanced—torture, prejudice, mob domination, failure of counsel to protect interests, etc. It is thus summarized by counsel for appellants—

"The grounds urged in the motion were the state of public feeling against the defendants, the fact that the defendants and witnesses were frequently subjected to torture for the purpose of extracting from them admissions of guilt and to make them testify against the defendants; that they were given no opportunity to consult with their friends and seek assistance, or informed of the charge against them until after their indictment; that they were carried from jail to the courtroom without having been permitted to see or talk with an attorney or any other person in regard to their defense; that the court appointed counsel for the defendants without consulting them, or giving them an opportunity to employ their own counsel; that the state of public feeling was such that they could not have a fair jury; that the trial proceeded without their consulting with their counsel or any witnesses, or being given an opportunity to obtain witnesses; that they were never in court before and were entirely ignorant of what they could do to defend themselves; that the trial from beginning to end occupied three-fourths of an hour and the verdict was returned in from three to six minutes. Four of the defendants say that they never had a copy of the indictment served upon them, one had it only forty-eight hours before the trial.

"Another ground was that under the practice which prevailed in the State only white men were summoned

to sit on the grand jury or the jury, and that by this discrimination the defendants were deprived of their rights under the Constitution of the United States; that they had no notice or knowledge of what steps they should take to raise this point before the trial; that the verdict is contrary to the law and evidence.

"To this motion are attached two affidavits, one of Alf Banks, Jr., and another of William Wordlaw who testified to the fact that they were whipped, placed in the electric chair and strangled by something put in their noses to make them testify. These defendants did not suffer from what was done to these witnesses, as they did not testify at their trial, but their affidavits confirm the testimony of the others as to the treatment to which the Negroes in confinement were exposed."

A new trial having been denied, an appeal was granted to the State Supreme Court and sixty days allowed for preparing bill of exceptions; March 22, 1920, this appeal was argued orally and by briefs; March 29th the court announced its opinion, reviewed the proceedings and affirmed the judgment. *Hicks* v. *State*, 143 Ark. 158. A petition for rehearing was presented April 19th and overruled April 26th.

A petition for certiorari filed in this Court May 24, 1920, with the record of proceedings in the state courts, set forth in detail the very grounds of complaint now before us. It was presented October 5th, denied October 11th, 1920.

April 29, 1921, the Governor directed execution of the defendants on June 10th. June 8th the Chancery Court of Pulaski County granted them a writ of *habeas corpus;* on June 20th the State Supreme Court held that the Chancery Court lacked jurisdiction and prohibited further proceedings. *State* v. *Martineau*, 149 Ark. 237. August 4th a justice of this Court denied writ of error. Thereupon, the Governor fixed September 23rd for execu-

tion. On September 21st the present *habeas corpus* proceeding began, and since then the matter has been in the courts.

It appears that during September, 1919, bloody conflicts took place between whites and blacks in Phillips County, Arkansas—"The Elaine Riot." Many negroes and some whites were killed. A committee of seven prominent white men was chosen to direct operations in putting down the so-called insurrection and conduct investigation with a view of discovering and punishing the guilty. This committee published a statement, certainly not intemperate, about October 7th, wherein they stated the "ignorance and superstition of a race of children" was played upon for gain by a black swindler, and told of an organization to attack the whites. It urged all persons white or black, in possession of information which might assist in discovering those responsible for the insurrection, to confer with it, upon the understanding that such action would be for the public safety and informant's identity carefully safeguarded. I find nothing in this statement which counsels lawlessness or indicates more than an honest effort by upstanding men to meet the grave situation.

It is true that in October, 1920, almost a year after the trial here under consideration, the American Legion post at Helena—approximately three hundred ex-service white men—made protest to the Governor against commutation of the sentences. It is copied in the margin as printed in the record.[1] The Helena Rotary Club, November 10,

[1] "RESOLUTION.

"It has been brought to the attention of the Richard L. Kitchens Post, No. 31, American Legion, Helena, Arkansas, that the Governor is contemplating commuting the sentence of four of the negroes, who are now under death sentences for their participation in the Elaine Riot, to lesser sentences, and we, the members of this Post, feel that any action toward this end by the Governor would do more harm in

1920, expressed emphatic approval of this protest, and the Lions Club took like action. These resolutions are not violent and certainly do not establish the theory that defendants' conviction in November, 1919—a year before—was an empty form and utterly void; nor, as the

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the community and breed lawlessness, as well as disregard for constituted authority, as at the time of this race riot the members of this Post were called upon to go to Hoop Spur and Elaine to protect life and property, and in compliance with this request, there were two American Legion members killed and one seriously injured, besides the other non-members who also perished, and when the guilty negroes were apprehended, a solemn promise was given by the leading citizens of the community, that if these guilty parties were not lynched, and let the law take its course, that justice would be done and the majesty of the law upheld.

"The twelve negroes now under sentence of death, but whose sentences are suspended—account of court procedure, and six of these negro cases have—taken to the Supreme Court of the United States, which court declined to review. The other six cases, whose original trials were reversed and new trials given them, were convicted, and their cases were appealed to the Supreme Court of the State and attorneys of their own selection were permitted to handle their cases.

"Now therefore be it resolved by this Post assembled on this the 19th day of October, 1920, that we most earnestly protest against the commutation of any of the sentences of these twelve negroes convicted of murder in the Elaine riot of October 1919, their having received a fair trial and—proven guilty, and the leniency of the court was shown in the balance of the cases tried, these being the ring leaders and guilty murderers, and that law and order will be vindicated and a solemn promise kept.

"Be it further resolved that a committee of four be appointed by the Post Commander. This Committee is hereby empowered to represent this Post at a conference, or several conferences, with the Governor of Arkansas and to take such steps as they may deem necessary to carry out the wishes of this resolution and leaving nothing undone to have these sentences carried out. This committee to report in full to the next meeting of this Post.

"Passed unanimously 8:30 P. M. October 19, 1920, basement of the Episcopal Church, Helena, Arkansas."

petition recklessly alleges, do they "further and conclusively show the existence of the mob spirit prevailing among all the white people of Phillips County at the time petitioners and the other defendants were put through the form of trials and show that the only reason the mob stayed its hand, the only reason they were not lynched was that the leading citizens of the community made a solemn promise to the mob that they should be executed in the form of law."

The Supreme Court of the State twice reversed the conviction of other negroes charged with committing murder during the disorders of September, 1919. The first opinion came down on the very day upon which the judgment against petitioners was affirmed, and held the verdict so defective that no judgment could be entered upon it. The second directed a reversal because the trial court had refused to hear evidence on the motion to set aside the regular panel of the petit jury. *Banks* v. *State*, 143 Ark. 154; *Ware* v. *State*, 146 Ark. 321. The Supreme Court, as well as the trial court, considered the claims of petitioners set forth by trusted counsel in the motion for a new trial. This Court denied a petition for certiorari wherein the facts and circumstances now relied upon were set out with great detail. Years have passed since they were convicted of an atrocious crime. Certainly they have not been rushed towards the death chair; on the contrary there has been long delay and some impatience over the result is not unnatural. The recent execution of assassins in England within thirty days of the crime, affords a striking contrast.

With all those things before him, I am unable to say that the District Judge, acquainted with local conditions, erred when he held the petition for the writ of *habeas corpus* insufficient. His duty was to consider the whole case and decide whether there appeared to be substantial reason for further proceedings.

Under the disclosed circumstances I cannot agree that the solemn adjudications by courts of a great State, which this Court has refused to review, can be successfully impeached by the mere *ex parte* affidavits made upon information and belief of ignorant convicts joined by two white men—confessedly atrocious criminals. The fact that petitioners are poor and ignorant and black naturally arouses sympathy; but that does not release us from enforcing principles which are essential to the orderly operation of our federal system.

I am authorized to say that MR. JUSTICE SUTHERLAND concurs in this dissent.